



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
CHAIRMAN FRED UPTON

The Policy Paper Series

Transforming Ideas Into Solutions

GOP Solutions: A Compilation of Policy Proposals from the House Committee on Energy and Commerce



Prepared by the Energy and Commerce Committee, Majority Staff

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Editor's Note

Under the leadership of Chairman Fred Upton (R-MI), the U.S. House Committee on Energy and Commerce strives to be an incubator of public policy solutions. The committee's jurisdiction spans telecommunications, consumer protection, food and drug safety, public health research, environmental quality, energy policy, and interstate and foreign commerce. It oversees multiple cabinet-level Departments and independent agencies, including the Departments of Energy, Health and Human Services, Commerce, and Transportation, as well as the Environmental Protection Agency, the Federal Trade Commission, the Food and Drug Administration, and the Federal Communications Commission. In all of these areas, the panel's members have sought to develop thoughtful, durable policies that support job creation and economic growth, modernize government for the innovation era, and protect individuals, families, and civic initiatives. The committee is pursuing solutions that shrink the federal government's footprint while improving its predictability and workability in those areas in which it remains.

The committee's Republican majority established *The Policy Paper Series* to support its legislative work with policy development and analysis. Over the last several years, the committee has released papers on a broad range of topics and with a variety of formats. These papers combine historical review, data, and assessment of current policies to help make the case for creative new solutions to major public policy challenges.

This compilation is a re-issuance of a handful of the policy papers issued by the Energy and Commerce Committee over the course of the 113th Congress (2013-2014), as well as a few new papers that expand the committee's record. These papers offer a foundation on which to build policy work in the coming years. It is not a complete set of all papers authored by the committee; readers interested in the full collection are encouraged to visit <http://energycommerce.house.gov/issues/analysis> for more.

Republicans on the Energy and Commerce Committee are offering a clear policy vision for America. Our members develop and promote new ideas, offering a platform for responsible governing. These papers explore topics as wide-ranging as Medicare and Medicaid reform, health insurance and public health, energy infrastructure, American manufacturing, spectrum management, and much more. Read on for a sampling of *The Policy Paper Series* from the Energy and Commerce Committee.

Building the Architecture of Abundance

Upton Unveils Energy Vision to Energy Information Administration Conference

Originally Released July 15, 2014

In July 2104, House Energy and Commerce Committee Chairman Fred Upton (R-MI) addressed the Energy Information Administration 2014 Energy Conference to share his new vision for America's energy policy – the Architecture of Abundance. Upton outlined the five pillars needed to construct this new architecture: modernizing infrastructure, maintaining diverse electricity generation, permitting a new manufacturing renaissance, harnessing energy efficiency and innovation, and unleashing energy diplomacy. He described a number of steps the House has already taken toward constructing a 21st century energy policy, and expressed optimism for the future in achieving bipartisan success.



Remarks as Prepared

Thank you so much – happy to be here talking about one of the most exciting public policy issues in America: our energy abundance.

Let me begin by telling you a little bit about my M.O. as chairman of the Energy and Commerce Committee. I got my start working in the Reagan administration where I learned it does not matter who gets the credit, as long as the job gets done. That's how I operate my committee – every good idea is welcome, and we do better when we work together.

We have plenty of bipartisan success to show for it. In the 112th Congress, 88 Energy and Commerce bills passed the House, and 40 of them were signed into law. In the 113th Congress, 62 Energy and Commerce bills passed the House, and 15 have been signed into

law. And we're heading into the homestretch. All but a few of these bills we've moved have had bipartisan support.

It's no secret that I've been disappointed by the Senate's failure to follow our lead and get many more bills signed into law – especially on energy. I'm going to keep on reaching out, welcoming new ideas, and working to get the job done – and today, we're going to talk about how we can get that job done, particularly when it comes to energy.

I am often asked about America's energy policy. Do we have one? Is it time to change? I'd like to share my vision for what America's energy policy is today, and what it ought to be tomorrow.

But first, let's remember our energy past. Perhaps you remember hearing these words: "The oil and natural gas we rely on for 75 percent of our energy are running out. In spite of increased effort, domestic production has been dropping steadily at about six percent a year. Imports have doubled in the last five years. Our nation's independence of economic and political action is becoming increasingly constrained."

Those words were spoken by President Carter in 1977. He predicted that we could lose our nation's economic independence. But earlier this month, as we celebrated America's independence on the 4th of July, we welcomed the real prospect for energy independence with news that by some estimates, the U.S. is now the world's biggest oil producer, surpassing Saudi Arabia and Russia.

In fact, we have more energy than any other nation and according to EIA, we produced enough energy in 2013 to meet 84 percent of the country's demand – a remarkable turnaround from 2005, when we hit a low of just 65 percent.

You heard yesterday from Daniel Yergin about the vast potential for American energy production and the resulting economic investment and growth. It's a new era of energy abundance, and we need to usher in a new era for energy policy.

I call it the "Architecture of Abundance." Here's what I mean: we need to construct a whole range of tools to take full advantage of our energy abundance – we need to better connect these resources to the people who need them. And we need to do it in a safe and responsible way that protects the environment. It's about building infrastructure, yes, but it's about much more.

Our new energy vision can be understood as five distinct but clearly related policy concepts – the five "pillars" to construct this new architecture.

Pillar I: Modernizing Infrastructure

First, let's look at energy transmission and distribution. It's time to modernize and update our energy distribution infrastructure. This will allow us to keep up with

burgeoning supplies and better connect new sources of energy with all American consumers.

We can do this with targeted changes to federal laws that provide certainty, predictability and fairness – in other words, we'll take politics and obstruction out of siting new energy infrastructure and bring back accountability to pipeline permitting agencies.

We have already started – let me give you some examples. We've already passed H.R. 3, a bill that would finally approve the Keystone XL pipeline. We've also already passed H.R. 3301, a bill I wrote with Democratic Representative Gene Green from Texas to make sure energy projects with our North American neighbors are never again caught in Keystone-style gridlock. And we've also passed H.R. 1900, a bill to restore predictability to natural gas pipeline permitting by setting shot clocks and clear processes for project review and approval.

Building new energy infrastructure is essential, and there is much more work to be done.

Pillar II: Maintaining Diverse Electricity Generation

Our second pillar is diverse electricity generation. We all need and reliable power, and everyone – families, schools, businesses, hospitals, manufacturers – everyone benefits when it costs less to keep the lights on. That's why we're so concerned about the administration's aggressive approach to limit and undermine critical baseload sources of generation like coal and nuclear.

We're going to continue to press for answers on how EPA and the states plan to implement the new climate rules. We can also support a diverse portfolio by enacting targeted changes to federal laws to make sure all sources of electricity generation can compete in the market. We have begun offering ideas in this area as well – let me give you some examples.

We've already passed H.R. 3826, a bill to make sure EPA's new power plant rules are achievable in the real world, and to put Congress back in the driver's seat on the rule for existing plants. In the last Congress and again in this one, we've approved H.R. 2218, a bill to put a more sensible, state-based regulatory system in place for coal ash recycling and management, and we're also going to keep pressing the administration to follow the law when it comes to nuclear waste.

Again, these bills are just the starting point when it comes to our electricity supply.

Pillar III: Permitting a Manufacturing Renaissance

Our third pillar has to do with permitting – not just for energy projects, but for manufacturing.

Manufacturers and other energy intensive industries need the confidence to make multi-billion dollar, long-term investments – including new foreign direct investment – in this country. To do that, we should make it easier to plan for new or changing regulatory requirements.

One example of a bill to improve the permitting process and welcome this new manufacturing renaissance is a bill that cleared our committee just last month. H.R. 4795, the Promoting New Manufacturing Act, is pretty simple – it would increase transparency and require timely rules and guidance for certain air permits. This is another area ripe for future action with new challenges from GHG permitting and ozone on the horizon.

Pillar IV: Harnessing Energy Efficiency and Innovation

Our fourth pillar is about energy innovation and efficiency. Energy efficiency is just common sense – it saves money and resources, and we know it can be done through private-sector led innovation and without having to limit consumer choices. That means prioritizing efficiency legislation that helps to save taxpayer dollars with no costs or mandates. It also means updating laws that haven't adapted to today's new energy realities, like the renewable fuel standard.

This is one area where we have already had quite a bit of success. Back in March, the House approved H.R. 2126, the Energy Efficiency Improvement Act. That bill included four separate energy efficiency measures, including the Better Buildings Act to establish a Tenant Star program, which builds on the original Energy Star initiative to encourage commercial tenants and landlords to work together on highly efficient leased spaces.

We've passed other efficiency measures as well, including energy efficiency in schools, energy efficiency in federal buildings, and bills to promote hydropower. And there will definitely be more to come.

Pillar V: Unleashing Energy Diplomacy

Our fifth and final pillar is energy diplomacy. Let's face it, energy is a global commodity, and those who have the energy have the power. We're seeing this play out in real time with Russia, and we know how chaos in the Middle East affects us here at home.

We have an opportunity to use our energy as a diplomatic tool; we can take care of our domestic needs and have enough energy left to let our allies buy it from us, rather than being held hostage to unstable regions of the world. That means making sure our current laws are not creating artificial barriers to the market and conducting oversight to ensure increased exports do no harm to American consumers.

Let me give you an example of how we can use energy as a diplomatic tool. We recently passed H.R. 6, a bill that will speed up the approval of natural gas export applications at the Department of Energy and improve the process going forward. More than two dozen export applications are pending at DOE, and some have been waiting for

more than two years. Even DOE says we have enough natural gas to meet our needs here at home and support our allies around the world.

Our work will continue next year as we conduct oversight of oil, coal, nuclear and renewable technology exports as well.

A Resilient Foundation

Those five pillars make up the architecture, and they can be built on a foundation of modern tools to meet modern challenges. Let me give you a couple of examples: as we look at our energy infrastructure, we can make sure it is resilient to climate risks and that it can prevent and withstand emerging threats such as cyber and physical attacks.

The climate is an issue that often comes up when we talk about energy policy, and I agree that it ought to be part of our conversation. One thing we should all be able to agree on is that storms are becoming more destructive because more people and property stand in their way.

We do need energy infrastructure that is resilient to weather events; what we don't need is a climate policy that will hamstring our economy and make energy more expensive, all without actually changing the climate.

So what are some specific steps we can take to accomplish this? We can work with state and local officials to enact a pro-infrastructure agenda. And we can build safer and more resilient pipelines and transmission lines to help respond to weather emergencies.

Potential Benefits

Those five pillars, that's the energy vision – now let's talk about why we need it. America has a lot to gain if we put the right energy policies into place: jobs and economic growth, cheaper energy and products for the middle class and particularly for the most vulnerable, and a stronger position in the world.

So let's conclude by returning to where this conversation began: American energy policy. America's energy policy today includes some good ideas, and some not so good ideas – but mostly, it reflects the sheer power of American ingenuity to overcome obstacles and develop new technologies that will allow us to make the most of our resources. America's energy policy in the future needs to do better. Ingenuity, innovation, and technology have unlocked these resources, but we need infrastructure, regulatory structure, and a global vision to take full advantage of them. All of these elements, together, in a broad energy vision: it's the Architecture of Abundance.

A Bright Future

Things looked different when I first came to D.C. – a different majority in Congress, and certainly very different ideas about energy policy. Think about it. Back then, our energy

policy was based on an assumption of scarcity – a belief that we were literally running out of oil and gas. That belief turned out to be wrong. We now can talk about North American energy independence, not reliance on oil sheiks and petro dictators. We have a chance to bring real benefits and security to hard working Americans.

For as long as I have been here, I have believed that no matter which party was in charge, lawmakers from different backgrounds with different ideas could come together to get things done. I still believe that today.

I believe this is our moment. I believe we can work together to improve people's lives. And I believe energy is a place where we can do it. We can and we will enact these policies to build the Architecture of Abundance.

Yes, we need willing partners in the Senate and the White House, and I believe that come next year, the time will be right to get these policies moving. The great economic news coming from energy-producing states is going to increase awareness of these issues, and I'm convinced the American people are going to expect us to act. If the pundits are right, then Republicans are going to have an opportunity, and we're going to have to prove we can govern. I'm excited about the possibilities.

Prosperity at Home and Strengthened Allies Abroad: A Global Perspective on Natural Gas Exports

Originally Released February 4, 2014

Executive Summary

The rapid growth in American natural gas production offers a variety of opportunities, including the chance for America to become a natural gas exporting nation. Doing so would benefit the U.S. as well as our allies and trading partners, many of who have been vocal in their support of such exports.

The economic benefits of exporting liquefied natural gas (LNG) outweigh the costs, according to a report conducted for the Department of Energy (DOE). This report found that America can produce more than enough natural gas to meet domestic demand affordably while also supporting export markets. The report further concluded that the net benefits of exports apply to consumers as well as the overall economy, and that these benefits increase along with the level of exports. Other studies have reached similar conclusions.

Although the economic benefits of LNG exports are significant, they may well be exceeded by the geopolitical benefits. By becoming a natural gas exporter, the U.S. can supplant the influence of other exporters like Russia and Iran while strengthening ties with our allies and trading partners around the world. U.S. LNG can also help the developing world by providing a much-needed source of affordable energy, and offer those countries pursuing environmental objectives the option of using clean-burning natural gas.

However, time is of the essence and DOE's slow approval process for LNG exports is squandering the chance to maximize our energy advantage. DOE has only made five decisions since the first non-FTA application was submitted over three years ago, and more than 20 applications still await action. America's window of opportunity will not remain open for long. In the face of continued delays, nations with near-term energy needs will be forced to look elsewhere for supplies, LNG facilities will have difficulty securing financing in an uncertain regulatory environment, and America will see greater competition from other LNG exporters. To avert these risks to our global LNG export leadership potential, the committee urges DOE to approve all pending LNG export applications by the end of 2014. In addition, the committee will consider legislative reforms to streamline and expedite the approval process to better reflect America's new energy abundance and the benefits of natural gas exports.

Introduction: From Scarcity to Abundance

The House Committee on Energy and Commerce has focused considerable attention on the biggest emerging energy story of this generation – the growth of domestic natural gas and oil production. Long-held beliefs in the inevitable decline of American gas and oil

output have given way to the new reality of increasing abundance. These energy sources, along with coal, nuclear, and renewables, can provide the nation with the benefits of a diverse and plentiful energy portfolio for decades to come.

The resurgence of natural gas and oil is an extremely important transformation, but it is one for which Washington has yet to adjust. Many outmoded federal policies, based on the old assumptions of energy scarcity and rising imports, are still in force and stand in the way of the opportunities before us. This committee has taken the lead in reviewing these policies and fighting for needed changes.

Several hearings have been devoted to various aspects of the nation's expanding natural gas and oil abundance, with a particular emphasis on the legal and regulatory changes necessary to realize the full potential of these resources.

The Subcommittee on Energy and Power began the 113th Congress with a hearing entitled [“American Energy Security and Innovation: An Assessment of North America's Energy Resources.”](#) In this overview of the resource base, the Energy Information Administration (EIA) described the dramatic increases in domestic natural gas and oil production – all the more dramatic given that production had been falling for decades and many in Washington assumed that continued declines were unavoidable. Instead, the U.S. has rapidly reversed the declines and emerged as the world's largest producer of natural gas and oil in 2013.¹ The production increases show no signs of slowing down and should continue in the years ahead. Renowned energy analyst Dr. Daniel Yergin estimates that this energy revolution already supports 1.7 million jobs (making it one of the few employment bright spots in recent years) and could support 3 million jobs by 2020.²

The impressive rise in natural gas output since 2005 has been made possible by American innovations in hydraulic fracturing and horizontal drilling. EIA's rising estimates of natural gas reserves strongly suggest that American output can exceed domestic needs into the future.³ Specifically, it projects a 56 percent production increase by 2040, remaining well above projected domestic demand.⁴ U.S. natural gas imports, which had previously been high enough to noticeably impact global supplies, have declined dramatically and are now negligible.

However, the federal government has failed to encourage this energy transformation. In fact, due to access restrictions that keep vast areas off-limits⁵, natural gas and oil production on federally controlled lands and offshore areas has not increased at all. In the case of natural gas, the Congressional Research Service reports that “overall, U.S.

¹See [“U.S. expected to be largest producer of petroleum and natural gas hydrocarbons in 2013.”](#) U.S. Energy Information Administration, October 4, 2013.

² [Testimony](#) of Dr. Daniel Yergin, IHS, Inc., before the House Energy and Commerce Committee. February 5, 2013.

³ [Testimony](#) of Adam Sieminski, EIA, before the House Energy and Commerce Committee. February 5, 2013.

⁴ See [“Annual Energy Outlook 2014 Early Release Overview.”](#) U.S. Energy Information Administration.

⁵ [Testimony](#) of Mary Hutzler, Institute for Energy Research, before the House Energy and Commerce Committee. February 5, 2013.

natural gas production rose by 4 trillion cubic feet (tcf) or 20 percent since 2007, while production on federal lands (onshore and offshore) fell by about 23 percent and production on non-federal lands grew by 40 percent.”⁶ The already-impressive net growth in natural gas supplies from state and private lands could be considerably enhanced if federal lands were more fully brought into the mix.

Subsequent hearings explored the tremendous economic potential of this resource bounty. For example, a joint hearing by the Subcommittee on Commerce, Manufacturing, and Trade and the Subcommittee on Energy and Power, entitled “[U.S. Energy Abundance: Manufacturing Competitiveness and America’s Energy Advantage](#),” detailed the benefits of a steady stream of low-priced natural gas to American manufacturers competing on a global stage. Chemical and fertilizer producers that use natural gas as a feedstock are benefitting tremendously. Indeed, these facilities – and their jobs – are coming back to the U.S. after years of having been outsourced. They may soon be joined by companies that split molecules of natural gas into various chemicals in a process known as “cracking.” These chemicals, such as ethylene and their derivatives, are then used by the manufacturing sector to make a variety of plastics and consumer products. Investments in these facilities in America are being considered for the first time in over 50 years.

Those who make the equipment used in the energy boom – everything from drilling equipment to pipes – have also prospered. And most other manufacturers benefit from lower-priced electricity produced from natural gas, which alongside coal and other sources, hold the potential to secure affordable electricity now and well into the future.

But once again, ill-suited federal policies frequently act as an impediment. This new energy needs new infrastructure to deliver it to the factories, power plants, and other end users that benefit from it. However, creating this architecture of abundance is slowed at every step by archaic federal rules that can cause years of delays and even block some pipeline and power line projects outright. Most notably, the Keystone XL pipeline expansion project to bring 800,000 additional barrels of Canadian oil to American refineries has been delayed for nearly five years by the Obama administration. Keystone XL – with its potential to create thousands of jobs while supplanting Middle East oil imports – may have garnered most of the attention, but many other infrastructure projects that could help make up the architecture of abundance face similar roadblocks.

The House approved the committee’s bipartisan bill, [H.R. 3, the “Northern Route Approval Act,”](#) to approve Keystone XL. The same is true of [H.R. 1900, the “Natural Gas Pipeline Permitting Reform Act,”](#) that would expedite and streamline future natural gas pipeline approvals. The committee has also introduced [H.R. 3301, the “North American Energy Infrastructure Act,”](#) to reduce unnecessary red tape for authorizations of energy infrastructure projects that cross the Canadian or Mexican border in order to create a more robust North American energy market. The committee continues to explore other options to eliminate bottlenecks and commence building the architecture of abundance.

⁶ Congressional Research Service, “[U.S. Crude Oil and Natural Gas Production in Federal and non-Federal Areas](#),” March 7, 2013.

The Benefits of Natural Gas Exports

Perhaps the most exciting opportunity presented by this new energy abundance is the potential for America to increase energy exports. We have long been a coal-exporting nation, but now we are in a position to be a natural gas exporting nation as well. In fact, the price of natural gas in many overseas markets is considerably higher than in the U.S., creating the potential for very profitable exports, even after transportation costs are taken into account (Figure 1).



A Subcommittee on Energy and Power hearing, entitled "[U.S. Energy Abundance: Exports and the Changing Global Energy Landscape](#)," focused on the potential benefits of energy exports, including domestic jobs and improved balance of payments. An analysis conducted by NERA for the Department of Energy concludes that America has more than enough natural gas to meet its domestic needs affordably while also supporting export markets, and that doing so would be a net benefit to the American economy.⁷ Other studies have drawn similar conclusions.⁸

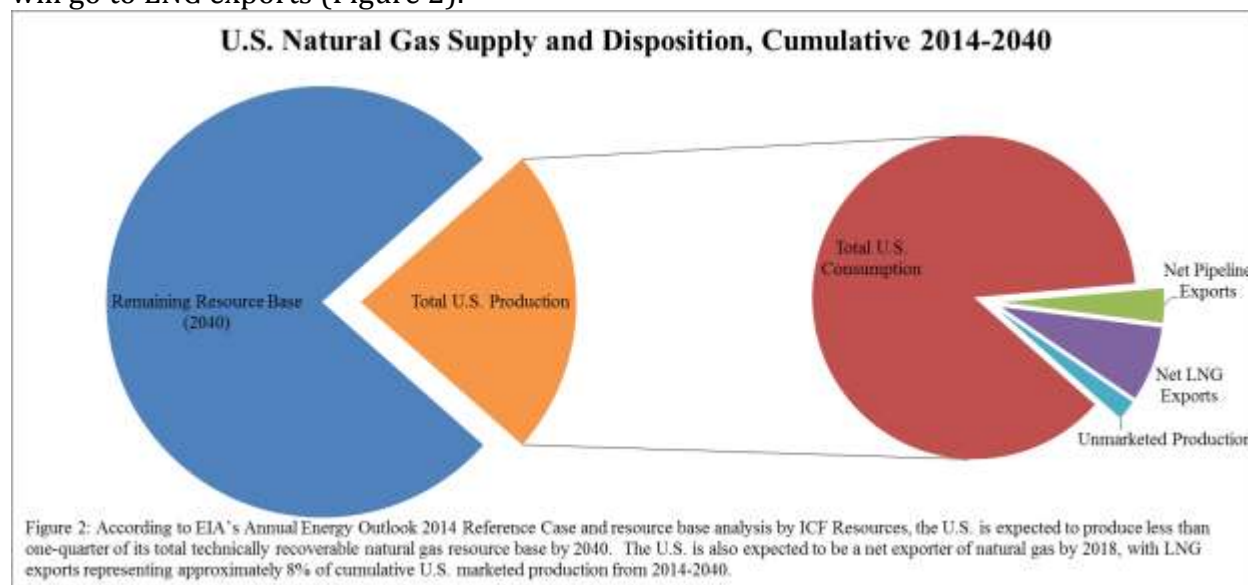
The U.S. has a tremendous resource base of low-cost natural gas. According to the congressional testimony of ICF Resources, the remaining technically recoverable U.S. natural gas resource base is 3,850 trillion cubic feet (tcf). Over 1,200 tcf is available in the Lower-48 at \$5.00 per million British Thermal Units (MMBtu).⁹ To put this in perspective, the U.S. used 25.6 tcf of natural gas in 2012. Driven mainly by increasing natural gas demand from the electricity sector, the Energy Information Administration predicts that consumption will rise to 31.6 tcf in 2040. Domestic production is expected to keep pace with the new demand, growing to 37.5 tcf in 2040. EIA predicts that the U.S. will be a net

⁷ See "[Macroeconomic Impacts of LNG Exports from the United States](#)," NERA Economic Consulting, December 3, 2012.

⁸ See "[Liquid Markets: Assessing the Case for U.S. Exports of Liquefied Natural Gas](#)," Brookings Institution, May 2, 2012; "[New Dynamics of the U.S. Natural Gas Market](#)," Bipartisan Policy Center, May 2013; "[Liquefied Natural Gas Exports: America's Opportunity and Advantage](#)," ICF International, December 2013.

⁹ [Testimony](#) of Mr. Harry Vidas, ICF International, before the House Energy and Commerce Committee. February 5, 2013.

exporter of natural gas by 2018, with exports of LNG from new liquefaction capacity rising to 3.5 tcf in 2029 and remaining at that level through 2040.¹⁰ Overall, only a fraction of the nation's vast natural gas resource base will be produced by 2040, and only a fraction of that will go to LNG exports (Figure 2).



Some policymakers have expressed concern over the price impacts of allowing U.S. natural gas exports. However, the body of evidence, including the study requested by DOE, suggests that price impacts will be moderate and unlikely to be driven by the volume of U.S. gas exported. As NERA found, the market limits how high U.S. natural gas prices can rise under pressure of LNG exports because importers will not purchase U.S. exports if the U.S. wellhead price rises above the cost of competing suppliers. The same study also found that across all scenarios, including allowing unlimited exports, U.S. economic welfare consistently increases as the volume of natural gas exports increased.¹¹

But yet again, federal red tape threatens to get in the way. To be exported, natural gas must be transformed into a liquid at very low temperatures, and loaded onto ships for export. The specialized LNG export facilities that can perform these tasks are an important part of the architecture of abundance, but building and operating them is subject to a very cumbersome federal permitting process.

DOE plays a critical role in enabling the U.S. to take advantage of the new era of energy abundance by regulating the trade of natural gas. DOE exercises jurisdiction over the commodity itself (natural gas), whereas other federal agencies, such as the Federal Energy Regulatory Commission (FERC), state, and local bodies have jurisdiction over the facilities used to export the commodity. DOE's authority arises under the Natural Gas Act, which sets the standard for review of most LNG export applications. Applications to

¹⁰See ["Annual Energy Outlook 2014 Early Release Overview."](#) U.S. Energy Information Administration.

¹¹ See ["Macroeconomic Impacts of LNG Exports from the United States,"](#) NERA Economic Consulting, December 3, 2012. Pg. 6.

countries with which the U.S. has a Free Trade Agreement (FTA) in effect are granted automatically. The process is much more complicated and uncertain for applications involving the majority of countries, those with which the U.S. does not have a FTA.

The Natural Gas Act establishes a rebuttable presumption that a proposed export of natural gas to a non-FTA country is in the public interest; however, the statute does not define “public interest” nor identify the criteria that must be considered. As a result, DOE identified a growing list of factors, including economic impacts, international impacts, and security of supply. In addition, DOE relies on outdated 1984 Policy Guidelines related to the *import* of natural gas (at the time, it was believed that the U.S. would need to import more LNG) to weigh these factors. Overall, DOE’s standard of review is unpredictable, evolving, and has been slow to reflect the nation’s newfound natural gas abundance and the growing benefits of energy exports.

DOE’s adopted procedures, including its role as a cooperating agency with FERC for the purpose of complying with the National Environmental Policy Act (NEPA), present unique challenges, as recently demonstrated in DOE’s order conditionally granting Freeport LNG authorization to export.¹² Seemingly new criteria were added, and DOE partially denied the requested volume of natural gas not on the basis of previously stated public interest criteria,¹³ but because of a discrepancy identified in Freeport’s filing before FERC relating to the size of the facility and the environmental review process.

DOE appears to be moving away from the market principles that once guided the process. In its 1984 Policy Guidelines on LNG imports, the agency stated that “the market, not government, should determine the price and other contract terms of imported natural gas ... The federal government’s primary responsibility in authorizing imports will be to evaluate the need for the gas and whether the import arrangement will provide the gas on a competitively priced basis for the duration of the contract while minimizing regulatory impediments to a freely operating market.”¹⁴ DOE has seemingly abandoned this limited approach in favor of lengthy and comprehensive reviews of each export application under which almost any factor can be fair game. This unsettled review process has led to extensive delays and additional uncertainty, with more than 20 applications currently pending before the agency, some for over a year.¹⁵

Among the justifications for DOE’s cautious and case-by-case approach is the concern that if every application for export were approved, the resulting exports would

¹² DOE/FE Order No. 3357. Available at: <http://energy.gov/sites/prod/files/2013/11/f5/FE%20DOCKET%20NO.%2011-161-LNG%20ORDER%20NO.%203357.pdf>

¹³ [Testimony](#) of Christopher Smith, U.S. Department of Energy, before the House Energy and Commerce Committee. June 18, 2013.

¹⁴ Department of Energy 1984 Policy Guidelines. Available at: <http://www.fossil.energy.gov/programs/gasregulation/authorizations/policy.pdf>

¹⁵ Applications received by DOE/FE to Export Domestically Produced LNG from the Lower-48 States. Available at: <http://energy.gov/sites/prod/files/2014/01/f6/Summary%20of%20LNG%20Export%20Applications.pdf>

create a substantial draw on domestic supplies of natural gas and cause a significant price increase. However, the previous record for FERC-approved LNG terminals does not bear this out. During the years when the U.S. faced the daunting task of building more import terminals in the face of declining production, there were approximately 33 applications that entered into the FERC application process. However, only five of these onshore import facilities were ultimately constructed.¹⁶ The reasons why only five were constructed vary, but given the complexity and costs of LNG projects, variables such as how many projects the market will ultimately support, and overcoming the federal, state, and local regulatory barriers to actually constructing a facility dictate that an approval to export LNG by no means guarantees a facility will be constructed or operational.¹⁷

Whether these regulatory hurdles comply with the General Agreement on Tariffs and Trade and other trade agreements is a matter of considerable dispute.¹⁸ As one of the 159 member nations of the World Trade Organization (WTO), the U.S. is obligated to comply with these agreements. Ironically, the U.S. has expressed strong objections when other nations restrict exports of natural resources – such as OPEC’s oil embargo of 1973-74 and ongoing efforts by China to limit rare earth exports – yet, DOE may be doing much the same by erecting regulatory barriers to LNG exports through its current interpretation of the Natural Gas Act.¹⁹

It should be noted that LNG facilities are multi-billion dollar capital investments that take several years to build, so any regulatory uncertainty as to when they will be approved and to whom they are allowed to sell can have a chilling effect on investment.

A hearing entitled, [“U.S. Energy Abundance: Regulatory, Market, and Legal Barriers to Export.”](#) focused on these extensive regulatory obstacles. Many experts see them as relics from a time of perceived energy scarcity and fears of domestic shortages, and believe that they should be updated to take full advantage of LNG export opportunities.²⁰

The Global Perspective on LNG

While these hearings emphasized the potential economic benefits of LNG exports, they also touched on the tremendous geopolitical benefits. Indeed, many believe that important foreign policy goals can be more effectively advanced through increased energy trade than through diplomacy or foreign aid programs. Further, an increased American contribution to global energy markets can enhance national security by supplanting the

¹⁶ Map of North American LNG Terminals. Available at: <http://energy.gov/sites/prod/files/2013/04/f0/LNG%20Import%20%26%20Export%20Terminal%20Maps%2012-18-2012.pdf>

¹⁷ Interviews with Marc Robinson, former Director, Office of Energy Programs, Federal Energy Regulatory Commission, January 2014.

¹⁸ See [“LNG and Coal: Unreasonable Delays In Approving Exports Likely Violate International Treaty Obligations”](#) National Association of Manufacturers, November 2013.

¹⁹ See [“Liquefied Natural Gas Exports: An Opportunity for America”](#), Peterson Institute for International Economics, February 2013.

²⁰ [Testimony](#) of Lou Pugliarese, Energy Policy Research Foundation, Inc., before the House Energy and Commerce Committee. June 18, 2013.

influence of the troublesome participants currently dominating those markets, especially Iran and Russia.²¹

To fully understand the global implications of LNG exports, it is critical to hear directly from those allies and trading partners around the world that are seeking this American energy. By listening to these voices, we can better understand the energy problems they face, and why they see U.S. LNG as an important part of the solution. For this reason, on October 10, 2013, the Subcommittee on Energy and Power hosted a forum, entitled [“U.S. Energy Exports: Geopolitical Implications and Mutual Benefits.”](#) The participants, representing the Commonwealth of Puerto Rico and many foreign nations included:

- Czech Republic: Joroslav Zajicek, Deputy Chief of Mission,
- Haiti: Rene Jean-Jumeau, Minister Delegate to the Prime Minister, Charge of Energy Security,
- Hungary: Anita Orban, Ambassador-at-Large for Energy Security of the Ministry of Foreign Affairs,
- India: Taranjit Singh Sandhu, Deputy Chief of Mission,
- Japan: Yasushi Akahoshi, Minister, Economy, Trade, Industry and Energy,
- Lithuania: Zygimantas Pavilionis, Ambassador to the United States and Mexico,
- Puerto Rico: Dr. Efrain O'Neill-Carillo, Senior Energy Advisor to the Governor,
- Singapore: Ashok Kumar Mirpuri, Ambassador to the United States,
- South Korea: Ahn Ho-Young, Ambassador to the United States, and
- Thailand: Saroj Thanasunti, Charge d'Affaires.



These nations vary greatly in terms of their current energy supply challenges and expected future needs. They also differ in their levels of economic development, national security concerns, environmental policy priorities, and other energy-related factors. But

²¹ [Testimony](#) of Amy Myers Jaffe, University of California, Davis, before the House Energy and Commerce Committee. May 7, 2013.

they all have one thing in common – they are dependent on energy imports and have expressed a strong interest in LNG from the U.S.

Increased U.S. Global Influence From LNG Exports

Electricity can be produced from a variety of sources – coal, natural gas, and nuclear, as well as renewable sources like hydroelectric, wind, and solar. Different nations (and regions within nations) strive to achieve an electricity portfolio best suited to their particular circumstances to ensure reliability and affordability. Currently, many nations would like to add more natural gas into their electricity mix given its affordability and low emissions, and U.S. LNG is widely seen as an excellent source of new supply.

In a geopolitical context, the benefits of diversity apply to suppliers as well as supplies, and the added option of U.S. LNG enhances both kinds of diversity. This is especially important to Central and Eastern European nations heavily reliant on Russia for natural gas. This dependence has not only led to higher prices, but also to the ability of Russia to exert political pressure on these nations.

Zygimantas Pavilionis, Lithuanian Ambassador to the United States and Mexico, noted his nation's heavy reliance on natural gas from Russia's Gazprom, adding that "we pay the highest price for gas in the world." Beyond costs, he also discussed incidences of Russia using its energy leverage to exert pressure over Lithuania on political matters, especially those involving Lithuania's efforts to break free from the Russian sphere of influence and align more closely with the European Union (E.U.) and America. Pavilionis added that Russia has a history of threatening to cut off supply to Lithuania and other nations and has occasionally followed through on those threats. "An ability to import natural gas from the U.S., even if very small amounts by U.S. standards, would make a huge impact on the Lithuanian gas market and allow the nation to develop a reliable alternative to Russian gas," he concluded.

Jaroslav Zajicek, Deputy Chief of Mission for the Czech Republic, relayed similar experiences. He explained that the sharp drop in U.S. imports of natural gas is already helping by freeing up additional supplies from the Caribbean and other sources that were once destined for the U.S. but now serve the Western European market. "We have already seen examples where the Russian negotiating position during contract-renewal talks was weakened thanks to decreasing prices on the markets in Western Europe," he said. With regard to the threat of Russian supply disruptions to the Czech Republic, Zajicek urged that "if supplies get cut, if our security is in threat, we have to stand for each other. [U.S.] LNG would benefit the common security of the whole transatlantic family."

Many Asian nations are highly dependent on imports for their energy needs, much of which comes from the unstable Middle East. For this reason, the prospect of U.S. LNG is especially valued for its stability. For example, Yasushi Akahoshi, Japan's Minister of Economy, Trade, Industry and Energy, said that "half of the expanded demand for natural gas is coming from the Middle East, and our dependence on that region is rising." He concluded that "the import from the U.S. would be the most reliable supply, which could

bring about less dependency on the Middle East.” Taranjit Singh Sandhu, India’s Deputy Chief of Mission, stated that U.S. LNG exports “would provide a steady, reliable supply of clean energy and help diversify our imports from our traditional suppliers.”

It should also be noted that many of the nations participating in the forum have cooperated with the U.S. to impose economic sanctions on Iran. Quite arguably, American self-sufficiency in natural gas has made it easier for these nations to do so since they now are less dependent on Iranian natural gas.²²

U.S. LNG exports would serve to strengthen this kind of cooperation. Ashok Kumar Mirpuri, Singapore’s Ambassador to the United States, said, “Increased LNG exports to Asia would further anchor the U.S. economic presence and further contribute to enhancing the region’s energy security. In doing so, the U.S. would strengthen its partnerships in the region, serving regional stability and its global interests.” Similarly, Anita Orban, Hungary’s Ambassador-at-Large for Energy Security of the Ministry of Foreign Affairs, said that “the United States can advance its own foreign policy objectives with a new tool which is called energy diplomacy.” In effect, rising American natural gas exports would lead to rising American global influence, a development that these nations welcome.

Global Economic Development Benefits

America gains from a stronger world economy, and LNG exports can play a role in accomplishing that end. This is particularly true of poorer countries for which affordable energy is a key component of economic development. These countries are especially interested in LNG because it is cheaper than the energy sources they currently rely upon.

Rene Jean-Jumeau, Haiti’s Minister Delegate to the Prime Minister, sees U.S. LNG exports as a means for his country to transition “from an aid based relationship to a trade based relationship.” He said, “The question of energy is central to every type of issue of development that we can consider.” Jean-Jumeau added that replacing the oil Haiti currently uses to generate electricity with natural gas would lead to “a reduction in the cost of electricity by at least 30 percent.” This would have the double benefit of making electricity more accessible to the citizens of Haiti (a majority of Haitians do not yet have access to it), while also ensuring the low energy prices necessary to attract investment in manufacturing.

Indeed, LNG exports to developing nations would help accomplish many of the same economic goals for which direct aid was intended.

Efrain O’Neill-Carillo, Senior Energy Advisor to the Governor of Puerto Rico, also emphasized the benefits of affordable energy from LNG to low-income populations, along with the energy security benefits. “Lower electricity costs in Puerto Rico will mean better socio-economic conditions, lower social problems, increase our energy security and overall

²² [Testimony](#) of Amy Myers Jaffe, University of California, Davis, before the House Energy and Commerce Committee. May 7, 2013.

security in the region.” He noted that Puerto Rico produces 70 percent of its electricity from oil, and that “when the average price of a barrel of oil increases by \$10, it is estimated that \$700 million dollars leave Puerto Rico’s economy every year.”

India’s Mr. Sandhu similarly noted that “there is a price advantage in LNG imports from the U.S. compared to current prices from traditional suppliers, which is an important factor in the energy policy decision-making for a developing country like India.”

Environmental Benefits

Nations around the world have varying energy policy priorities, which in addition to securing long-term affordable energy may include reducing greenhouse gas emissions or reducing air pollution from energy use. But many have limited options for moving to lower emitting sources of electrical generation. For example, Japan has suspended its nuclear power program in response to the Fukushima Daiichi accident. Nations like Singapore have insufficient land for renewable sources, while others like Haiti must first expand baseload power before accommodating intermittent renewables like wind and solar. Natural gas can affordably provide a baseload source of electricity and do so with the added benefit of lower emissions.

America can help many of these nations achieve their environmental objectives simply by making LNG available. For example, in considering Japan’s need for non-nuclear alternatives, Minister Akahoshi said that using natural gas “would contribute to emissions reductions, which is one reason we would like to expand use of natural gas from the U.S.” Japan is one of many countries around the world that must rely on crude and fuel oil in order to meet part of their electricity demands due to an inability to secure enough natural gas supplies. South Korean Ambassador Ahn Ho-Young noted that “we made a commitment in Korea to reduce the emissions of carbon dioxide by year 2020, a 30 percent reduction. In order to do it, we will have to ... further increase use of LNG. This is the reason we are encouraged by the new source of energy.” India’s Mr. Sandhu added that “LNG is an important component of our environmentally sensitive energy security strategy.”

For Puerto Rico, there is little choice but to move from oil-burning facilities to natural gas to comply with the Clean Air Act. Mr. O’Neill-Carillo explained, “Puerto Rico needs LNG by mid-2015 due to EPA’s regulations.”

Conclusion: The Need for Certainty from the U.S. and Updating of Existing Federal Authorities

Our friends and allies around the globe desperately need a more stable, reliable, and affordable supply of natural gas, and American consumers and manufacturers need continued robust demand to bring additional resources into competitive production. The U.S. has the opportunity to be the world’s preferred supplier, and the case for mutually beneficial trade is very strong.

However, because of regulatory delays and uncertainty, many nations believe they cannot rely on U.S. LNG. Some of these countries need additional energy in the near term, thus the regulatory delays may force them to pursue less desirable and more expensive options. “[T]here is a window of opportunity here for the next few years which may easily be gone in a couple of years,” said Ambassador Orban of Hungary. It should be noted that approvals of export applications can have an impact well before the LNG actually comes online. Orban added that “the very fact that American LNG could appear on the Central European and the European market would give us a negotiating position vis-a-vis our traditional supplier which would result in immediately lower prices.”

Other nations’ LNG import facilities, as with U.S. export facilities, are expensive to build. The nations undertaking these projects cannot move forward without assurances that U.S. LNG will in fact be sold to them and that they will not be subject to years of regulatory limbo. Saroj Thanasunti, Thailand’s Charge d’Affaires, said, “We are seriously considering the potential to import LNG from the United States; however, this would require a huge amount of investment, and that investment needs some levels of certainty and predictability that LNG from the U.S. will be allowed to be exported.” Other nations expressed similar reservations.

For these reasons, as well as the domestic benefits outlined earlier, the committee urges DOE to approve all pending LNG export applications by the end of 2014. Doing so would maximize the benefits of natural gas exports, both for the U.S. and for our allies and trading partners.

The committee is also considering a range of potential legislative options to remedy the regulatory obstacles. This includes revisions to the Natural Gas Act to require a more certain and timely DOE approval process for natural gas export applications – one that better reflects the new era of natural gas abundance and benefits of energy trade while recognizing that time is of the essence. It may also include a shift in focus away from a recipient nation’s FTA status to the much more inclusive benchmark of whether it is a member of the WTO.

Given the scope of potential benefits from LNG exports, and the relatively narrow window to maximize the U.S. energy advantage, it is imperative that the regulatory process be expedited so that these benefits can be realized. The committee will continue to pursue forward-looking policies to help realize the nation’s newfound energy potential. The future is bright with the right policies in place.

A History Worth Repeating: The Alaska Pipeline and Its Lessons for Keystone XL

Originally Released March 5, 2013

Introduction

Canada's growing oil production holds the potential to provide the U.S. with a much-needed additional energy supply from a reliable ally and trading partner. However, the existing pipeline system linking the two countries is close to capacity and thus unable to take advantage of this opportunity. TransCanada, a Canadian energy company, has proposed the Keystone XL pipeline expansion project to carry nearly a million additional barrels of oil per day from Alberta to American refineries in the Midwest and Gulf Coast. While the project enjoys widespread public support and has been the subject of extensive environmental review and public comment, federal approval for it has been held up by the Obama Administration for four years. The President has suggested that he will make a decision on Keystone XL in 2013, but given the number of variables that could be used to force further delay, there is no clear end in sight.

This is not the first time a vital pipeline has faced bureaucratic delays. The Alaska Pipeline, which has provided the nation with billions of barrels of oil and thousands of jobs since it opened in 1977, was nearly prevented from being built by federal delays similar to those now holding up Keystone XL. The pipeline became a reality only after Congress passed the 1973 Trans-Alaska Pipeline Authorization Act, which cleared away the roadblocks and approved the project.

There are important lessons from the Alaska Pipeline precedent as Congress seeks to end the impasse on Keystone XL and looks ahead to future energy infrastructure projects threatened by federal red tape.

A Short History of the Alaska Pipeline

There are many striking parallels between Keystone XL and the debate over the Alaska Pipeline in the late 1960s and early 1970s. A major discovery of oil in the North Slope of Alaska at Prudhoe Bay – the largest on the continent prior to the development of the oil sands in Alberta – necessitated a pipeline to bring this oil to southern Alaska for transport to West Coast refineries. A consortium of companies proposed to build the 800-mile Alaska Pipeline.

The project was thoroughly studied for several years, during which all environmental and safety concerns were addressed. Nonetheless, federal approval became bogged down by delays not unlike those currently impeding Keystone XL. This included the National Environmental Policy Act (NEPA), a 1969 statute requiring major projects to obtain a federally issued Environmental Impact Statement (EIS). Congress did not intend for this requirement to add years of delays to projects, but that has often been the result. In

the case of the Alaska Pipeline, the EIS underwent multiple rounds of litigation and revisions and eventually reached 3,500 pages. In the interim, delays pursuant to other federal statutes arose and were litigated by environmental organizations opposed to the pipeline. The project appeared to be going nowhere.

However, increased Middle East turmoil and rising oil prices finally sparked congressional action. In 1973, Congress passed and President Nixon signed the Trans-Alaska Pipeline Authorization Act. The statute's purpose was "to insure that, *because of the extensive governmental studies already made of this project* and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska pipeline be constructed promptly without further administrative or judicial delay or impediment" (emphasis added). In effect, Congress ended paralysis-by-analysis and green-lighted the project.

Construction of the Alaska Pipeline began in 1974 and created tens of thousands of jobs at a time of high national unemployment. Despite numerous engineering challenges associated with Alaska's extreme temperatures and rugged terrain, the project was completed on time in 1977. It has been in operation ever since.

To date, the Alaska Pipeline has delivered over 16 billion barrels of oil to the American market, considerably more than many of the project's critics had predicted. It has contributed substantially to the health of Alaska's economy (and remains highly popular among the state's residents) while supporting jobs across the country and strengthening national security. And, notwithstanding the many dire predictions at the time from anti-pipeline activist groups (several of which also oppose Keystone XL), the pipeline has amassed an excellent environmental and safety record, and it did so using technology far less sophisticated than what will be required of Keystone XL.

In sum, the pipeline that almost didn't happen is now widely considered to be a great success – indeed many see it as a source of national pride. The Trans-Alaska Pipeline Authorization Act was an acknowledgement by Congress that the environmental review process it created had gotten out of hand, and that a project clearly in the national interest was being jeopardized. With that bill, Congress took back control of the process and put an end to the unnecessary delays.

Lessons for Keystone XL and Beyond

Keystone XL is in much the same position today as the Alaska Pipeline was in 1973. Once again, federal red tape is blocking a project likely to reduce oil imports from unfriendly countries – a study conducted for the Department of Energy concluded that Keystone XL has "the potential to very substantially reduce U.S. dependence on non-Canadian foreign oil, including from the Middle East." Once again, the delays are impeding middle class job creation – approximately 20,000 direct and over 100,000 indirect jobs, according to a study conducted for TransCanada. And, once again, the environmental rationale for the delays is undercut by the government's own findings – the EIS for both the Alaska Pipeline and Keystone XL found that every alternative to the project (including not building the pipeline at all) carries relatively higher environmental risks.

There are some procedural differences between the two. Only Keystone XL involves a border crossing and thus requires certain additional steps by the President. But overall, the unjustified Washington delays evoke a clear sense of energy infrastructure déjà vu.

It should be noted that Keystone XL has, at this point, been more extensively studied than the Alaska Pipeline at the time Congress gave it the go-ahead. The NEPA process was initiated in November 2008, and the EIS underwent multiple rounds of revisions before being issued in final form in August 2011. However, the Obama Administration subsequently decided to reopen the process in light of a dispute over the pipeline's route through Nebraska. On January 22, 2013, Nebraska Governor Dave Heineman transmitted a letter to the President in support of the re-route through the state of Nebraska, putting the decision and timeline back in the administration's hands. On March 1, 2013, the State Department released its draft Supplemental Environmental Impact Statement (SEIS), which found that the pipeline, including the revised route, would have limited adverse environmental impacts. Overall, the review of Keystone XL under NEPA has been going on for more than four years and is still not over.

Incredibly, the Obama Administration has acknowledged the problem red tape poses to infrastructure projects by issuing an Executive Order on March 22, 2012, that sought to improve federal permitting performance. However, it has yet to apply its own prescriptions to Keystone XL.

As with the Alaska Pipeline, Keystone XL's opponents have used the time bought by the NEPA delays to prepare subsequent legal challenges. For example, one environmental organization is now alleging that Keystone XL would harm a species of beetle and thus may violate the Endangered Species Act of 1973 – another federal statute often misused to hinder economic activity.

Absent congressional action, the delays could continue indefinitely. Meanwhile, the Canadian government is understandably disappointed by its treatment at the hands of the Obama Administration – past cross-border pipeline projects were approved more quickly, and no plausible explanation has been given for why Keystone XL should be an exception. Prime Minister Stephen Harper has announced that Canada has no choice but to consider alternative options for bringing its expanding oil output to market, including construction of a pipeline from Alberta to the Pacific coast for export by tanker to China. If this happens, the benefits of Keystone XL, and access to an abundant energy supply, would be lost.

Conclusion

As in 1973, it is time for Congress to end the delays and approve a pipeline project that is clearly in the national interest and that has already undergone sufficient scrutiny. And, beyond the need to approve Keystone XL, Congress should consider fundamental reforms to restore balance in the federal approval process and prevent future infrastructure projects from becoming ensnared in excessive red tape.

State and Federal Partnership to Manage Environmental Protection

Originally Released December 10, 2014

Environmental protection issues can be both complex and challenging, particularly when dealing with varying factors across different regions and states. Federal, state, and local governments all play an important role in protecting the environment, and they all share the same goal. But too often, one-size-fits-all government mandates from Washington do not address local needs.

Policy decisions should be made at the appropriate level of government, namely, the level closest to the people, which has the intrinsic authority to make and implement the decision. The broader central authority should have a subsidiary function performing only those tasks which cannot be performed effectively at a more immediate or local level. Environmental policy is no exception. Sorting out when the U.S. Environmental Protection Agency (EPA) and when a state or local government should implement environmental policy is not easy, and it has been an important focus of the Environment and the Economy Subcommittee. Management of coal combustion residuals offers a good case study on how to resolve this dilemma.

Background of Coal Combustion Residuals Regulation

On December 22, 2008, a coal ash containment facility in Kingston, Tennessee ruptured. The Tennessee Valley Authority and state and federal officials took action to contain the damage but the incident spurred discussion regarding the appropriate regulatory standards to manage coal ash in order to prevent such spills, and who should implement those standards, the states or the federal government.

In June 2010 EPA proposed two basic options for regulating coal ash. The first EPA proposal was to regulate coal ash management and disposal under Subtitle C of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA), which regulates hazardous materials, and would require “cradle to grave” regulation of coal ash, from the point of generation, through transportation, storage, and disposal.

An alternative EPA proposal was to regulate coal ash under Subtitle D of SWDA, the title regulating non-hazardous solid waste. Under Subtitle D, the disposal of nonhazardous solid wastes is regulated primarily by the states pursuant to federal guidelines. RCRA Subtitle D requirements relate just to the disposal of waste, and do not require regulation of transportation or storage of waste, from the point of generation. Under Subtitle D, EPA proposed detailed coal ash regulations some of which would phase out the use of surface impoundments for management and disposal of coal ash.

The EPA proposals attracted broad-based opposition. Regulating coal ash as hazardous waste was particularly controversial because EPA on two previous occasions had analyzed coal ash and concluded that, based upon the lack of toxicity, regulation as hazardous waste was not warranted. In the meantime, an entire industry had grown up around the reuse of coal combustion residuals including fly ash. They are used extensively in concrete production to strengthen roads, bridges, and buildings. They also enhance the durability of sheet rock and such consumer products as countertops and bowling balls. Moreover, the sale and reuse of coal ash can be an important factor in the economics of power plant operations. Industry expressed concern that even talking about regulating coal ash as though it is hazardous risked stigmatizing this valuable reuse, needlessly chilling industry growth.

There was also resistance to EPA's June 2010 proposal to regulate coal ash under Subtitle D. Industry objected to EPA's proposed automatic phase-out of surface impoundments for management and disposal of coal ash. States objected to EPA's top-down, self-implementing regulatory regime because many states already have in place detailed permit programs for regulating coal ash management and disposal. These state programs are tailored to the distinct needs and characteristics of disposal of coal ash in the state. State and industry stakeholders agreed that a more localized regulatory program for coal ash would provide protection for human health and the environment through enforceable permit programs while allowing for more regulatory flexibility.

Regulation of Coal Ash – EPA vs. States

The SWDA, as amended by RCRA, like other environmental statutes such as the Clean Air Act and the Clean Water Act follow a particular regulatory construct. Congress provides the framework in the underlying statute which directs EPA to promulgate regulations to interpret the statute. EPA in turn may delegate all or part of the implementation responsibilities to a state if EPA determines that the state will be able to adequately carry out the regulatory program prescribed by EPA. Once a state has received delegated authority, state autonomy versus continued oversight by EPA is often at the center of debate over implementation and enforcement. In the wake of the Kingston spill and EPA's June 2010 proposed rule, a key issue is whether EPA or the states are better positioned to regulate the management and disposal of coal ash and under what authority.

In regulating coal ash, EPA faces a dilemma: EPA's only option for creating an enforceable permit program for coal ash is under Subtitle C of the SWDA which means treating coal ash as a hazardous waste. In order to regulate coal ash as a non-hazardous waste under Subtitle D, the agency may only promulgate self-implementing standards for managing coal ash, which would leave enforcement to citizen suits and litigation.

Problems with EPA treating coal ash as a hazardous waste are complex and costly. First, hazardous wastes under Subtitle C must be regulated from cradle to grave and Subtitle C standards are far more expensive to comply with than standards for other solid waste. Further, a "hazardous" designation could chill the market for the beneficial reuse of coal ash in a host of products including concrete, wallboard, and dozens of others. By

stigmatizing the reuse of coal residuals, the designation would increase the cost of everything from housing to road construction.

Meanwhile, EPA regulation of coal ash under existing Subtitle D of the SWDA would also present problems. The self-implementing approach does not recognize the existence of any state regulatory requirements. An EPA-based regulation under Subtitle D would be enforced solely through citizen suits leading to an unpredictable array of regulatory interpretations. These limitations on EPA's ability to regulate coal ash raise two key questions:

- Would states be better positioned to regulate coal ash using a minimum set of federal standards?
- Can Congress prescribe, in statute, such minimum federal standards that will be implemented and enforced by the states?

The answer to both questions is yes. H.R. 2218, the Coal Residuals Reuse and Management Act, introduced in the 113th Congress and passed by the House on July 25, 2013, by a vote of 265 to 155 meets both challenges. Instead of handing the regulatory pen to EPA as most federal pollution control statutes do, H.R. 2218 would set minimum federal standards within the statute itself, and then allow the states to create and implement a regulatory program that meets the minimum criteria. The basis for the minimum federal standards in H.R. 2218 is an existing, successful regulatory program – municipal solid waste (MSW) – which was promulgated by EPA and implemented by the states to protect human health and the environment.

The coal ash legislation explicitly applies some basic requirements for handling MSW to structures that contain coal ash. This makes sense because MSW landfills are engineered like structures that would contain coal ash, and regulation of coal ash would require safeguards similar to those for municipal solid waste. For example, the MSW regulations contain siting restrictions, liner and cover design criteria, financial assurance, and corrective action requirements. The coal ash legislation sets minimum criteria for state regulatory programs over coal ash that contains these same elements – including requiring financial assurance, groundwater monitoring, and liners for all new landfills and impoundments and expansions of existing units. However, the coal ash legislation also acknowledges that certain standards are needed to address issues particularly associated with coal ash. For example, as coal ash is stored in surface impoundments the MSW regulations (which only apply to landfills) need tweaks to address storage of waste in surface impoundments. Coal ash also has constituents of concern that vary slightly from those identified in the MSW regulations. The coal ash legislation adds those coal ash-specific constituents to the lists to be monitored for by the states.

What makes the coal ash legislation different from other environmental laws is that the standards are set and voted on by the democratically elected representatives of the people - members of Congress. Then the program is turned over to state officials to make all the day-to-day decisions such as whether and when to issue permits, how to do site

inspections, how and when to issue permits, and how to enforce the regulatory program. Every state has an agency experienced in implementing the SWDA, and each of those agencies knows the distinct needs of its own state, and has ongoing local relationships with the community. The direct accountability that comes from this closeness to the people served accounts for the program's success. Meanwhile, the states do not need to constantly look over their shoulders for the next regulatory change imposed by an agency in Washington, DC.

Why Coal Ash Legislation is a Model for Other Environmental Regulation

The coal ash legislation is a model that could be applied to other environmental pollution control statutes where certain elements make it better suited to deal with environmental issues at the state level. One example is the 'opt in' opportunity for states that have already demonstrated an ability to run similar types of regulatory or permitting programs. States that have a proven track record with EPA for issuing and enforcing permits would be able to capitalize on that experience and avoid the delegation morass with EPA and state resources could be better spent on implementing the regulatory programs and protecting the environment. By lessening the EPA approval burden at the outset and by truly putting states in the driver's seat, states will be more inclined to shoulder new regulatory programs if they needn't go through the process of seeking delegation from EPA or be subject to over-filing by the agency.

The model set out in the coal ash legislation also shortens the lead-time for regulatory programs to be implemented because it eliminates a step when EPA would promulgate rules to define the regulatory requirements. There is no need to duplicate on the federal level, successful programs that already exist on the state level. Using the minimum federal guidelines in the statute, states can build on successful programs already in place.

Conclusion

H.R. 2218, the Coal Residuals Reuse and Management Act, delivers an innovative solution to a complex problem. It allows states and the federal government to work together to achieve important environmental protections and provides the flexibility needed to protect local economies. Enactment of this legislation would satisfy all federal regulatory requirements but empower the states to implement programs in a way that is best suited to fit the needs of a community. It is a win-win for both the environment and the economy and for EPA and the states, and it should serve as a model to solve future environmental challenges.

Smart Regulation – The Role of Science in Managing Risk

First Released As Part of This Compilation

Congress often enacts laws to protect human health and the environment from risks associated with items in interstate commerce. For example, Congress wants to make sure that air travel is safe, prescription drugs work and don't cause unacceptable side effects, and risks to consumers, workers, or the general public from exposure to chemicals is reasonable.

At the same time, most Americans do not insist on government regulation that achieves zero-risk. They understand that a zero-risk standard would mean that no planes would fly, no prescription drugs would be available, and a wide variety of popular and adequately safe items in commerce would be taken off the market altogether.

The challenge for Congress is to manage risk by setting a threshold for regulatory action high enough to protect human health and the environment from unreasonable risks, but not so high that consumers needlessly lose choices, workers lose jobs, or the economy grinds to a halt. To inform this balancing decision, regulators should be required under the law to apply high-quality, state-of-the-art science to evaluate real risk before making the broader policy judgments.

Failure to consistently apply this thoughtful approach shortchanges Americans, skews the public's understanding of the most urgent threats, and wastes public and private resources.

High-quality scientific review, including an unbiased risk assessment process, should be employed not to ratify a predetermined policy, but instead to allow government to evaluate the true risk presented in a particular situation. A scientifically reliable process is essential to validating the factors that are weighed in the decision-making process. These decisions often have profound effects on innovation, job creation, public health, and environmental protection.

High Quality Science – The Essence of Valid Risk Evaluation

To evaluate risk for the purpose of making a regulatory determination, the government should ask two questions:

1. What hazard does the item present?
2. What is the exposure for humans and the environment to that hazard?

Only with objective answers to both these questions can a policy determination be made as to whether an activity or article presents an acceptable level of risk.

For example, in the case of exposure to chemicals, Paracelsus's adage applies: "the dose makes the poison."¹ That is why scientists, particularly toxicologists, aim to determine the threshold dose above which the impact to humans is adverse. To find that threshold it's important to know whether human exposure occurs through eating, drinking, inhaling, or absorbing through the skin. Also, is acute exposure (once or twice) harmful or does only chronic exposure (repeated and sustained over months or years) cause the harm the regulators seek to avoid?

Answering these questions is not always easy.

The U.S. Environmental Protection Agency and witnesses before Congress have articulated the key facets of high-quality science and rigor that should go into these hazard and exposure (i.e., risk) analyses.²

First, high-quality science generates information using scientific and technical procedures, measures, and methods or models that are reasonable for, and consistent with, the intended application. In other words, the conduct of the science must focus on answering the question of risk in a way that makes sense for the particular decision.

Second, the scientific information gathered and used for risk analysis must be relevant for the question that government is trying to address. High-quality science should not rely upon speculative extrapolation of other studies. Biological testing must be appropriate for the species in question.

Third, the science should ensure that clear and complete documentation exists for the data, assumptions, methods, quality assurance, and analyses employed. This allows proof that measurements and testing are performed under well-controlled conditions and are not confounded by extraneous factors and influences, which may compromise accuracy and precision. The identity and authenticity of scientific measurements must be verifiable within a defined range of precision and the science must be able to demonstrate that the study measured what it claims to have measured.

Fourth, variability and uncertainty (quantitative and qualitative) in the information, procedures, measures, methods, and models must be evaluated and well characterized. Margins of error in the analyses should be transparently stated. This is necessary to truly understand the reliability of the data.

Fifth, enough clear detail must underlie the scientific study's conclusions that independent scientists can verify them, as well as validate and peer review the information, procedures, measures, methods, or models employed. If a reviewing scientist cannot replicate experimental results, it calls into question the reliability of the study's conclusions

¹ <http://en.wikipedia.org/wiki/Paracelsus>

² See <http://www.epa.gov/spc/pdfs/rchandbk.pdf>; see also http://democrats.energycommerce.house.gov/Press_111/20100225/Borgert.Testimony.pdf, pp. 2-3.

since the details of the original experiment are not accurately and clearly set out or the experiment may not have been performed correctly.

The above standards, grounded in the scientific method, ensure that a risk evaluation truly captures the relevant nature of hazards and exposures. Our idea is that instead of making these merely aspirational, we require their application by law. This would give the American people confidence that government decisions consider solid scientific data and analysis of the risks.

Even after applying these standards to the scientific information before decision-makers, there is a final need to evaluate the totality of the presented scientific information. This is especially important when the regulator does not face a clear-cut decision about whether to regulate the item. For example, if ten studies showed no risk at a certain exposure level, but one study did, regulators must decide whether the one is more scientifically compelling than the other ten combined. In these cases, the regulator must apply a “weight-of-the-evidence approach” to evaluate and make conclusions. The “weight-of-the-evidence approach” considers all relevant information in an integrative and objective manner that takes into account the kinds of evidence available, the quality and quantity of the evidence, the strengths and limitations associated with each type of evidence, and explains how the various types of evidence fit together.³ The “weight-of-the-evidence approach” should also be required by law.

High-quality science is not colored by fear, scare tactics, bias, or preconceived policy notions. While scientific knowledge and techniques are often evolving, high quality-science must be able to survive the test of appropriate inquiry and repeated, critical questioning.

For example, consider the advocacy of the regulation of atrazine in drinking water. Advocates were arguing for a (3) parts per billion standard under the Safe Drinking Water Act, but to reach that threshold dose under their model, a person would need to drink 3,000 gallons (38 full bathtubs) of drinking water containing atrazine daily for 70 years. Clearly, the standard was protective, but the bias of the model and science skewed the government standard well beyond the real risk -- even accounting for a margin of safety.⁴

Americans should be concerned if their government is corrupting the science to fit policy motivations. The Bipartisan Policy Center’s August 2009 Report, entitled “Improving the Use of Science in Regulatory Policy,” stated that “[p]olitical decision-makers should never dictate what scientific studies should be used, and they should base policy decisions on a thorough review of all relevant research and the provisions of the relevant statutes.”⁵ For example, decisions about how much risk society should tolerate or what actions should be taken in the face of scientific uncertainty are not science questions, rather they concern

³ <http://www.epa.gov/stpc/pdfs/assess2.pdf>

⁴ Paul E. Gillmor and Frederick R. Eames, “Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates,” *Harvard Journal of Legislation*, Summer 1994, pages 305-396.

⁵ <http://bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20fnl.pdf>

policies and values. Matters such as risk and uncertainty need to be informed by scientific results, but science cannot tell policy makers how to act, it can only inform their thinking and decisions.⁶

Conclusion

The optimal regulatory policy, one that protects public health and the environment and improves the overall quality of Americans' lives, must be supported by high-quality science that is complete and unbiased. This should not be a partisan issue, but rather a means to instill public confidence that government is using a reliable, objective measure to inform just and protective decisions. Considering what's at stake, it makes sense to have these requirements inform and improve legislative and regulatory deliberations. The Executive Branch should make scientific integrity the baseline for all its protective regulations.

⁶ Ibid.

Our Nation of Builders: Manufacturing Policy for the Future

First Released As Part of This Compilation

Executive Summary

The manufacturing sector was one of the hardest hit in terms of job losses during the Great Recession, continuing a pattern of decline that began well before the country experienced the economic freefall in 2008. While manufacturing jobs account for one-tenth of the nation's job force, the manufacturing sector has endured a third of the nation's job losses since the early 2000s.¹ The industry now exhibits welcome signs of a modest rebound. In November 2014, the Bureau of Labor Statistics (BLS) projected the number of Americans employed in the manufacturing sector to be roughly 12.2 million – a number around which the nation has hovered since March 2012.² While up from a low of just under 11.5 million in February 2010, the number of Americans currently employed in the industry remains far below the recent highs of over 14 million in the early and mid-2000s. The loss of these jobs hit Americans particularly hard because they pay, on average, over \$77,000 per year with benefits.³

The Great Recession saw a loss of 333,700 jobs in the auto manufacturing sector alone over the course of 18 months.⁴ In the steel industry, unfair trade practices coupled with prolonged productivity gains have resulted in historically low job numbers. According to Bureau of Labor Statistics (BLS) estimates, the housing market collapse pulled down total U.S. employment by 1.1 to 1.5 percent in 2008.⁵ The news, however, is not all negative. The manufacturing industry has begun a slow recovery – due in part to an unexpected source of cheap, clean, and efficient natural gas – but significant structural barriers across sectors threaten the nascent recovery. Because of a newfound wealth of affordable energy, private sector interests are now reconsidering the United States as a viable location to establish operations.

¹ Information Technology & Innovation Foundation, *Worse Than the Great Depression: What the Experts Are Missing About American Manufacturing Decline* (Mar. 2012) <<http://www2.itif.org/2012-american-manufacturing-decline.pdf>>.

² Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Industry: Manufacturing) (visited December Dec 17, 2014) (preliminary data). <<http://data.bls.gov/timeseries/CES3000000001?data_tool=XGtable>. Manufacturing employment levels hovered in the 14 million range from 2004 to mid-2007, after which time the number of people employed in the sector fell to 11.4 million in early 2010. The number slowly climbed to 11.9 million by March 2012 and reached a steady 12 million by late 2013.

³ National Association of Manufacturers, *Facts About Manufacturing* (visited December 18, 2014) <<http://www.nam.org/Statistics-And-Data/Facts-About-Manufacturing/Landing.aspx>>.

⁴ Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Industry: Motor vehicles and parts) (visited December 16, 2014) <http://data.bls.gov/timeseries/CES3133600101?data_tool=XGtable>.

⁵ Byun, Kathryn J., *The U.S. housing bubble and bust: Impact on employment* (Dec. 2010), <<http://www.bls.gov/opub/mlr/2010/12/art1full.pdf>> (visited May 21, 2013).

Recognizing the importance of manufacturing to a full economic recovery and robust middle class, the Subcommittee on Commerce, Manufacturing, and Trade embarked on a series of hearings on manufacturing in the 21st century to answer the most important questions about the vitality of this key sector:⁶ what is the true state of the manufacturing sector, what factors are holding back a full manufacturing recovery, and what policies could aid the sector's recovery. The objective of this series was to identify obstacles hampering American manufacturing and policies that will boost international competitiveness, generate real job growth, and renew investment in America. Across all sectors represented in the hearings, the challenges and prescriptions were the same: manufacturers need regulatory certainty and sensibility in safety, environmental, and financial standards; manufacturers need a simplified tax code with competitive rates to compete in global markets; manufacturers need a workforce competent in science, technology, engineering, and mathematics (STEM) and bolstered by smart, market-driven immigration and visa policies; and continued access to affordable, abundant energy is critical.

To aid the industry in its recovery, Congress must recognize that American innovation helped this country emerge as the world's largest economy, but heavy-handed regulation threatens innovation and recovery. Regulatory agencies must recognize that overregulation leads to adverse consequences and instead should pursue smart, market-based policies. Congress must also lower tax rates and simplify the tax code to encourage investment in American manufacturing. The administration should work with foreign governments to reduce burdens by enhancing regulatory cooperation and reducing regulatory duplication in trade agreements; it should also continue to stridently enforce trade violations. The public and private sectors must address the skills gap by encouraging STEM-education, and government should adopt smarter immigration policies so that foreign citizens may legally fill the labor gap even as workforce education produces a larger skilled workforce necessary to meet demand. Finally, policymakers should pursue forward looking policies to help realize the nation's newfound energy abundance.

Introduction

The United States is the world leader in manufacturing with the world's largest manufacturing economy, producing 17.4 percent of global manufactured products.⁷ According to the National Association of Manufacturers (NAM), the manufacturing sector supports nearly one in six jobs – jobs that, on average, pay over \$77,000 with benefits.⁸

⁶ The Subcommittee on Commerce, Manufacturing, and Trade convened a hearing on *Our Nation of Builders: Manufacturing in America* (February 14, 2013); *Our Nation of Builders: The Strength of Steel* (March 21, 2013); *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (April 10, 2013); *Our Nation of Builders: Home Economics* (June 4, 2013); and *Our Nation of Builders: Training the Builders of the Future* (November 15, 2013). The Subcommittee on Commerce, Manufacturing, and Trade convened a joint hearing with the Subcommittee on Energy and Power on *U.S. Energy Abundance: Manufacturing Competitiveness and America's Energy Advantage* (June 20, 2013).

⁷ National Association of Manufacturers, *Developed Countries' Share of Global Manufacturing Falls* (visited December 17, 2014) <<http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/Economy-and-Jobs/Global-Manufacturing-GDP/Global-Manufacturing-GDP.aspx>>.

⁸ National Association of Manufacturers, *Facts About Manufacturing* (visited December 17, 2014) <<http://www.nam.org/Statistics-And-Data/Facts-About-Manufacturing/Landing.aspx>>.

Nationwide, manufacturing employs 12 million Americans,⁹ and more than half of those Americans reside in states represented by current members of the Subcommittee on Commerce, Manufacturing, and Trade,¹⁰ creating a total economic output of nearly \$1.1 trillion.¹¹

In addition to supporting the highest paying jobs in the U.S. economy, manufacturing offers one of the strongest multiplier effects in the economy: every \$1 in direct spending produces \$1.35 in additional indirect output.¹² Conversely, each manufacturing job lost results in the loss of another 2.3 jobs.¹³

The revitalization and sustainability of this sector is crucial to closing the trade deficit and to a globally competitive U.S. economy, but there are varying projections for a manufacturing recovery. We are a nation of builders, and the more we build, the more the overall economy benefits.

State of the Manufacturing Sector

Job Loss and Recovery

Historically, the manufacturing sector is the hardest hit during an economic downturn but the quickest to recover due to pent-up demand for goods. In previous recessions, the U.S. economy regained lost manufacturing jobs in the 30 months following the end of the recession.¹⁴ Recent numbers from BLS provide a glimmer of hope that this sector may indeed be rebounding, though not at historical rates. For four and a half consecutive years, 2010 through the first half of 2014,¹⁵ the manufacturing sector added

⁹ Bureau of Labor Statistics, *Table B-1a. Employees on nonfarm payrolls by industry sector and selected industry detail, seasonally adjusted* (visited December 17, 2014) <<http://www.bls.gov/web/empsit/ceseeb1a.htm>>.

¹⁰ Bureau of Labor Statistics, *Table 5. Employees on nonfarm payrolls by state and selected industry sector, seasonally adjusted* (visited December 17, 2014) <<http://data.bls.gov/cgi-bin/print.pl/news.release/laus.t05.htm>>. Manufacturing employs 6.3 million Americans in the 18 States represented by this panel (not counting the U.S. Virgin Islands).

¹¹ National Association of Manufacturers, *US Manufacturing Statistics – Manufacturing & Trade Data By State* (visited December 17, 2014) <<http://www.nam.org/Statistics-And-Data/State-Manufacturing-Data/Manufacturing-by-State.aspx>>.

¹² National Institute of Standards and Technology, *U.S. Manufacturing In Context* (visited December 17, 2014) <http://www.manufacturing.gov/mfg_in_context.html#_ftn1>.

¹³ Information Technology & Innovation Foundation, *Worse Than the Great Depression: What the Experts Are Missing About American Manufacturing Decline* (Mar. 2012) <<http://www2.itif.org/2012-american-manufacturing-decline.pdf>>.

¹⁴ Information Technology & Innovation Foundation, *Worse Than the Great Depression: What the Experts Are Missing About American Manufacturing Decline* (Mar. 2012) <<http://www2.itif.org/2012-american-manufacturing-decline.pdf>>.

¹⁵ Month over month the sector added jobs during this period but for a setback suffered from April to July 2013. Since July 2013, the sector added an average 9,000 jobs per month through April 2014. Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Industry: Manufacturing) (visited December 15, 2014) <http://data.bls.gov/timeseries/CES3000000001?data_tool=XGtable>.

jobs, a stark contrast to the sector's consecutive yearly job losses from 1997 to 2009.¹⁶ The number of people employed sector-wide, however, remains far below the recent highs of over 14 million in the early and mid-2000s.

Recent figures provide a startling picture. Between 1980 and 1999, the manufacturing sector suffered an average 0.5 percent per year decline.¹⁷ While the sector's troubles clearly began long before the Great Recession, its troubles worsened in the 2000s. The rate of decline increased six-fold to a 3.1 percent per year decline for the 2000 to 2011 period, resulting in an average job loss of nearly 1,300 jobs per day - a number that jumps to 2,400 when taking into account the multiplier effect of manufacturing. The manufacturing sector lost 7.1 percent of its jobs in the 2001 recession and another 14.8 percent in the Great Recession, resulting in an overall loss of 5.7 million manufacturing jobs during the 2000s - a rate of decline exceeding that of the Great Depression.¹⁸ Unlike previous recessions, however, neither of these recessions was followed by a recovery of jobs lost in the next 30 months. Instead, the sector experienced an additional 9.4 percent loss in the 30 months following the end of the 2001 recession while the manufacturing job loss of the Great Recession was offset with less than 1 percent growth in the same timeframe. From its low point in February 2010 to January 2013, the 30-month period following the Great Recession, the manufacturing sector recovered just 529,000 jobs, leaving unrecovered nearly 1.8 million of the nearly 2.3 million total manufacturing jobs lost during the Great Recession.¹⁹

Auto Manufacturing

There are 13 major auto manufacturers operating plants in the U.S. today, 10 of which are foreign-headquartered companies. Across the board, the auto industry suffered severely during the Great Recession as annual U.S. production fell by nearly 50 percent, from 10.7 million vehicles manufactured in 2007 to a low of 5.7 million in 2009.²⁰ The industry is slowly but surely recovering, producing over 11 million vehicles in 2013²¹ and

¹⁶ Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Industry: Manufacturing) (visited December 15, 2014) <http://data.bls.gov/timeseries/CES3000000001?data_tool=XGtable>. See also Floyd Norris, *Manufacturing Is Surprising Bright Spot in U.S. Economy*, N.Y. Times, Jan. 5, 2012 <<http://www.nytimes.com/2012/01/06/business/us-manufacturing-is-a-bright-spot-for-the-economy.html>>.

¹⁷ Information Technology & Innovation Foundation, *Worse Than the Great Depression: What the Experts Are Missing About American Manufacturing Decline* (Mar. 2012) <<http://www2.itif.org/2012-american-manufacturing-decline.pdf>>.

¹⁸ Information Technology & Innovation Foundation, *Worse Than the Great Depression: What the Experts Are Missing About American Manufacturing Decline* (Mar. 2012) <<http://www2.itif.org/2012-american-manufacturing-decline.pdf>>.

¹⁹ Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Industry: Manufacturing) (visited December 15, 2014) <http://data.bls.gov/timeseries/CES3000000001?data_tool=XGtable>.

²⁰ Wards Auto Group, *World Vehicle Production in Major Countries* (2012).

²¹ International Organization of Motor Vehicle Manufacturers, *2013 Production Statistics*, (visited Dec 17, 2014) <<http://www.oica.net/category/production-statistics/2013-statistics/>>

adding approximately 221,500 jobs in both vehicle and parts manufacturing since its June 2009 low of 623,300.²²

Because of its high multiplier effect, auto manufacturing is an important direct and indirect contributor to the U.S. economy, creating jobs, attracting foreign investment, increasing trade, and spurring innovation. The motor vehicle and parts manufacturing industry directly employed 875,800 people as of November 2014,²³ but with a multiplier effect that generates employment for 8 million Americans across all 50 states, this sector supports more jobs than any other manufacturing industry.²⁴ The industry employs more than 10,000 workers in each of 47 states, and more than 100,000 workers in each of 20 states. Michigan still holds the largest number of auto-related jobs, supporting more than 1.18 million workers.

Sales of motor vehicles and parts comprise approximately 20 percent of all U.S. retail sales.²⁵ Additionally, the auto industry is a significant source of the overall gains in U.S. exports in recent years: the U.S. exported 2.6 million vehicles valued at \$63 billion in 2012, and additional exports of automotive parts were valued at \$75 billion.²⁶ The impact on U.S. trade is significant; the total value of U.S. auto exports grew to \$152.1 billion in 2013.²⁷

Steel Manufacturing

From cars and railroads to stainless steel appliances, buildings, and national defense, steel is an essential building block of our economy. Like most of the manufacturing industry, the steel industry experienced a rapid fall-off in employment but much of those losses occurred prior to the Great Recession. In 1963 the industry employed approximately 500,000 individuals, a number that fell to 100,000 in 2000. While that number has rebounded to 152,900,²⁸ the vast majority of the jobs lost prior to 2000 are unlikely to be regained.

The chief reason for the fall in employment is that steel manufacturing has seen the most rapid increase in productivity of all manufacturing industries. According to one study,

²² Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Industry: Motor vehicles and parts) (visited December 15, 2014) <http://data.bls.gov/timeseries/CES3133600101?data_tool=XGtable>.

²³ Bureau of Labor Statistics, *Automotive Industry: Employment, Earnings, and Hours*, (visited Dec. 17, 2014) <http://www.bls.gov/iag/tgs/iagauto.htm#emp_national> (preliminary data).>.

²⁴ Alliance of Automobile Manufacturers, *Auto Economics Quick Facts* (visited December 16, 2014) <<http://www.autoalliance.org/index.cfm?objectid=AD2A3AB0-AF3C-11E1-A9F3000C296BA163>>.

²⁵ Census Bureau, *Advance Monthly Sales for Retail and Food Services* (June 2014) <http://www.census.gov/retail/marts/www/marts_current.pdf> (visited Dec. 17, 2014).>.

²⁶ Department of Commerce, *The U.S. Automotive Industry* (visited December 15, 2014) <<http://selectusa.commerce.gov/industry-snapshots/automotive-industry-united-states>>.

²⁷ International Trade Administration, *U.S. Export Fact Sheet* (visited December 15, 2014) <<http://trade.gov/press/press-releases/2014/export-factsheet-february2014-020614.pdf>>.

²⁸ American Iron and Steel Institute, *Profile 2014* at 4 (visited December 17, 2014) <www.steel.org/~media/Files/AISI/Reports/AISI_Profile_14_FINAL.pdf>.

while those employed directly by the steel industry shrank by 80 percent between 1963 and 2000, the domestic industry's output only shrank by 15 percent.²⁹ Since the 1980s alone, the steel industry in the U.S. increased its productivity five-fold, resulting in a drop from 10.1 man-hours to 2 man-hours per finished ton of steel.³⁰ Exacerbating the problem is an archetypal supply and demand imbalance: as worldwide production has grown, demand has not kept pace even though it, too, has risen. In addition to a rapid increase in productivity and declining demand, the industry faces challenges from a flood of imported steel in recent years.

Homebuilding Industry

The homebuilding industry is fundamental to the health of the national economy, and, surprisingly, it is composed primarily of small businesses that build 10 or fewer homes per year and employ 10 or fewer workers. The health of the housing sector reverberates through industries such as manufacturing, construction, contracting, and home services. The construction industry in the United States accounts for 8 percent of GDP – one out of every 10 U.S. manufacturing shipments and one out of every 12 machinery shipments.

According to the BLS Employment Projections Program (EPP), at the peak of the U.S. housing boom in 2005, demand for residential construction supported 7.4 million jobs, or 5.1 percent of total employment. Following the housing market crash, residential construction-related employment fell to 4.5 million in 2008, just 3 percent of total U.S. employment. According to BLS estimates, the housing market collapse in 2008 pulled down total U.S. employment by 1.1 to 1.5 percent.³¹

Housing market collapses historically indicate the onset of recessions.³² Similarly, housing market booms tend to coincide with market-wide growth, and these industries should grow at a faster rate than the economy-wide average in a recovery. Recent signs of improvement in the housing market have strengthened the sense that the entire sector is poised for a recovery. According to the National Association of Home Builders' (NAHB) Housing Market Index (HMI), a seasonally adjusted index of housing market conditions, builder confidence registered over 50 in nine of the last 14 months – scores not seen since April 2006.³³ Any future housing market growth, however, is contingent upon many factors, including labor, supply, downstream structural costs, home financing availability, job and income growth, and overall health of the economy.

²⁹ National Bureau of Economic Research, *Reallocation and Technology: Evidence from the U.S. Steel Industry* at 5 (January 2013).

³⁰ American Iron and Steel Institute, *2014 Steel Industry Profile* at 4 (visited December 17, 2014) <http://www.steel.org/~media/Files/AISI/Reports/AISI_Profile_14_FINAL.pdf>.

³¹ Byun, Kathryn J., *The U.S. housing bubble and bust: Impact on employment*, at 4 (Dec. 2010) <<http://www.bls.gov/opub/mlr/2010/12/art1full.pdf>> (visited May 21, 2013).

³² Byun, Kathryn J., *The U.S. housing bubble and bust: Impact on employment*, at 5 (Dec. 2010) <<http://www.bls.gov/opub/mlr/2010/12/art1full.pdf>> (visited May 21, 2013).

³³ Table 2. NAHB/Wells Fargo National HMI: History” http://www.nahb.org/reference_list.aspx?sectionID=134 (July 16, 2014).

A Manufacturing Recovery: Barriers, Building Blocks, and Policy Recommendations

In 2012, the Harvard Business School conducted a survey of nearly 10,000 of its alumni regarding U.S. competitiveness. The study revealed a growing pessimism: a sense that there is a “deepening competitiveness problem” for the United States.³⁴ At the heart of this view is a belief that the U.S. is falling behind in fostering an environment conducive to job creation. In its 2012 report, *Facts About Modern Manufacturing (Facts)*, the National Association of Manufacturers Manufacturing Institute identified reasons that may contribute to the pessimistic views exposed in the Harvard study: U.S. manufacturers operate at a significant disadvantage in terms of structural cost burden.³⁵ External policy-related costs such as a persistently high corporate tax rate; the high cost of health care and pensions; the rising cost of energy; regulatory compliance; and tort costs contribute to a 20 percent premium on manufacturing in the United States – leaving the U.S. second only to France in structural cost burden among our nine largest trading partners. The industry leaders appearing before the subcommittees echoed these conclusions.

Regulatory Burden

“[E]very time a regulation is mandated, no matter how meritorious, there is a cost implication... Every time a new law or regulation is enacted... it adds to the costs, making it more difficult for our industry to make housing affordable,” Thomas Bozzuto testified on behalf of the National Multi Housing Counsel.³⁶ Citing his own company’s experience with 13 different federal agencies, George Kubat, President and CEO of Phillips Manufacturing, concluded “it has to be impossible for the smallest of manufacturers.”³⁷ He further pleaded that Congress “stop the bureaucratic growth of regulation,” stating, “Over the past several decades in the United States we have created a labyrinth bureaucracy of government policy and complexity of regulation that makes it difficult... to comply with today’s requirements.” Expressing the frustration of small business owners, when asked what Congress should do to reverse the manufacturing decline, Eric Myers, President of Oil City Iron Works, commented, “You asked what Congress should do, and honestly, for our industry, the regulations and taxing, health care, everything that we see coming down the pipeline is more burdensome. What you could do is stop. You could stop. That would allow us to be the manufacturing engine that drives this country and let us get back to work.”³⁸

³⁴ Michael E. Porter and Jan W. Rivkin, Harvard Business School, *Prosperity at Risk, Findings of Harvard Business School’s Survey on U.S. Competitiveness* (January 2012)

<<http://www.hbs.edu/competitiveness/pdf/hbscompsurvey.pdf>>.

³⁵ The Manufacturing Institute, *The Facts About Modern Manufacturing* (9th ed. 2012)

<<http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/~media/3EBE6A748B5B420E853B5216D4812847.ashx>>.

³⁶ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Home Economics* (Bozzuto, Thomas; June 4, 2013).

³⁷ U.S. House Subcomm. On Commerce, Manufacturing, and Trade, *Our Nation of Builders: Home Economics* (Kubat, George; June 4, 2013).

³⁸ U.S. House Subcomm. On Commerce, Manufacturing, and Trade, *Our Nation of Builders: Manufacturing in America* (Myers, Eric; February 14, 2013).

The Office of Information and Regulatory Affairs' numbers demonstrate the reasons behind these frustrations: currently approved "information collections" – or paperwork required of the private sector – mandate over 72 billion responses per year, requiring over 10 billion man hours to complete (the equivalent of more than 5 million full time employees) at a cost of over \$70 billion.³⁹ These numbers represent the regulatory burden for paperwork alone and do not include the cost of complying with other (i.e., non-paperwork) mandates. The Small Business Administration Office of Advocacy last reported on the cost of regulatory burdens in 2010, at which time it estimated the cost of compliance to be more than \$1.75 trillion annually, or \$10,585 per employee for small businesses and \$8,086 for firms employing 20 or more individuals.⁴⁰

These regulations are often adopted without consideration of the costs versus benefits. John Surma, CEO of U.S. Steel, testified that his "biggest challenges come from counterproductive and costly government policy and regulation."⁴¹ James Robinson, Senior Vice President of Kohler Company, urged that there be "greater sensitivity in government to rules and regulations that drive up manufacturing costs."⁴² He identified the lack of "sufficient lead time to prepare for oncoming regulations," rules that lack "good science" or that are "based on faulty or incomplete studies," and "contradictions...between and among federal agencies that share regulatory responsibilities" as factors driving up the cost of the regulations.

Ranking regulatory efficiency and certainty as the second most pressing issue facing his company, Joseph Hinrichs, President of the Americas of Ford Motor Company, recommended data-driven approaches to regulation, efficiency by avoiding a patchwork of state regulation, and regulatory cooperation between agencies to avoid inconsistent or conflicting regulation.⁴³ Thomas Bozzuto also recommended that there be demonstrable benefits to justify the costs of compliance, stating that he "probably could come up with 100 examples of rules and regulations that are in the nature of having been imposed because they were good ideas but not having any real benefit economically that justifies the costs associated with them."⁴⁴ To avoid "creat[ing] new problems where none previously

³⁹ Currently approved information collections require a total of 72,156,962,135 responses per year, at a cost of \$70,489,020,279 and 10,373,803,615 man hours. Office of Information and Regulatory Affairs, Inventory of Currently Approved Information Collections

<<http://www.reginfo.gov/public/do/PRAReport?operation=11>> (visited December 16, 2014).

⁴⁰ Small Business Administration, Office of Advocacy, The Impact of Regulatory Costs on Small Firms (Sept. 2010) <<http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20%28Full%29.pdf>> (visited December 18, 2014).

⁴¹ U.S. House Subcomm. On Commerce, Manufacturing, and Trade, Our Nation of Builders: Home Economics (Surma, John; March 21, 2013).

⁴² U.S. House Subcomm. On Commerce, Manufacturing, and Trade, Our Nation of Builders: Home Economics (Robinson, James; June 4, 2013).

⁴³ U.S. House Subcomm. On Commerce, Manufacturing, and Trade, Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward (Hinrichs, Joseph; April 10, 2013).

⁴⁴ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, Our Nation of Builders: Home Economics (Bozzuto, Thomas; June 4, 2013).

existed,” Scott Paradise, Vice President for Marketing and Business Development of Magna International, encouraged regulators to collaborate with the private sector.⁴⁵

For further evidence, consider the effect of all this regulation for something like the “Internet of Things,” which the Federal Trade Commission defines as the interconnection of “everyday” devices and products into the existing Internet allowing them to communicate with each other.⁴⁶ This network holds tremendous potential, some of which is already being realized, for manufacturing and other sectors. The “Internet of Things” is a paradigm changer that will force policy makers to rethink their approach. Industry specific regulation targeted at a vertical industry tube doesn’t always make sense when such a pervasive, horizontal component like the Internet enters the picture. With the “Internet of Things,” innovation wants to go in a million different directions at once, but could be stopped each time by industry specific regulation that isn’t ready for it.

Tax Rate

Nearly every witness identified the U.S. corporate tax rate as an impediment to building or expanding a competitive business. There are two main taxes burdening manufacturers in the United States today: the 35 percent nominal corporate income tax, the highest among developed economies in the world,⁴⁷ and the ongoing implementation of the Affordable Care Act (ACA).⁴⁸

Manufacturers of the past asked Congress for protectionist tariffs, import quotas, and bailouts, but over the past 30 years, American innovation has made U.S. workers the most productive in the world and the sector is no longer seeking help – they just aspire to be free of government-created obstacles. According to Curt Stevens, CEO of Louisiana-Pacific Corporation, “What we want is just a level playing field. We don’t want any subsidies. We want to play based on the economics of the use.”⁴⁹ This is crucial for keeping business in the United States, but it is a prerequisite for manufacturers to engage in exporting their products. As Joseph Hinrichs explained, “If you want to have a manufacturing base that is capable of exporting here from the United States, we need to have a competitive tax rate vis-à-vis the other countries of the world we are competing against.”⁵⁰ Drew Greenblatt, President of Marlin Steel Wire Products, stated, “We are competing against Canada. We are competing against Germany and Japan, and our tax

⁴⁵ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (Paradise, Scott; April 10, 2013).

⁴⁶ Federal Trade Commission, *Internet of Things – Privacy and Security in a Connected World* (visited at Dec. 17, 2014) < <http://www.ftc.gov/news-events/events-calendar/2013/11/internet-things-privacy-security-connected-world>>

⁴⁷ Organization for Economic Cooperation and Development, Table II.2 - Targeted corporate income tax rates: small business and other targeted provisions (available at http://www.oecd.org/tax/tax-policy/tax-database.htm#C_CorporateCapital) (visited December 18, 2014).

⁴⁸ *National Federation of Independent Business et al. v. Sebelius*, et al, 648 F. 3d 1235 (U.S. 2012).

⁴⁹ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Home Economics* (Stevens, Curt; June 4, 2013).

⁵⁰ U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (Hinrichs, Joseph; April 10, 2013)

rates are not competitive.”⁵¹ Like the cost of energy, tax rates are factored into decisions about where to build a factory, how many employees can be hired, and how much capital can be invested in research and development. History demonstrates that if the domestic tax rate is a factor preventing manufacturers from being competitive, those manufacturers will relocate.

The total effect of the ACA provisions on health care costs remains unknown given the numerous delays granted through administrative action. As a consequence, the greatest obstacle the ACA presents to businesses today is uncertainty. Despite the rest of the uncertainty surrounding the ACA, according to George Kubat, there is one expense small businesses can expect will impact their bottom line: “Income tax rates for smaller businesses which are fortunate enough to make money will go up by 3.8 percent in 2013.” Health care and regulatory compliance costs for businesses have and will continue to inevitably rise as ACA mandates, taxes, and requirements go into effect.

Trade – Free Trade Agreements and Unfair Trade Practices

Many witnesses before the subcommittee ranked efforts to open markets to free trade and continued efforts to enforce against unfair trade practices near the top of the list of factors critical to a manufacturing recovery.

The benefits of free trade are “increased tax revenues[,] GDP and an improved balance of trade” testified André de Ruyter, Senior Group Executive of Sasol Limited, pointing to his company’s U.S. projects as an example.⁵² By being able to ship products anywhere in the world without unnecessary tariffs, U.S. manufacturers can keep their operations based on U.S. soil. But the elimination of tariffs is only part of the equation. Through free trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP), the administration faces a unique opportunity to set the global standard for mutual recognition of regulatory standards, thereby negating the need for U.S. manufacturers to produce two different versions of their products for sale either domestically or abroad and freeing capital for further investment and expansion. According to Joseph Hinrichs, such “regulatory harmonization and mutual recognition of standards will enhance competitiveness in both regions”⁵³ Scott Dahl, Regional President of Robert Bosch, LLC, agreed, testifying, “Bosch sees many exciting opportunities on the horizon... [TTIP] would result in notable benefits for the automotive industry and consumers, particularly in the form of enhanced regulatory harmonization and standardization.”⁵⁴

⁵¹ U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, U.S. Energy Abundance: Manufacturing Competitiveness and America’s Energy Advantage (Greenblatt, Drew; June 20, 2013)

⁵² U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, U.S. Energy Abundance: Manufacturing Competitiveness and America’s Energy Advantage (de Ruyter, André; June 20, 2013)

⁵³ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward (Hinrichs, Joseph; April 10, 2013).

⁵⁴ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward (Dahl, Scott; April 10, 2013).

Of course, the number of free trade agreements is meaningless if our trading partners fail to play by the rules to which they agreed. The steel industry in particular faces challenges to recovery due to the unfair trade practices of foreign governments. Imported steel is often heavily subsidized by exporting countries in the forms of state-sponsorship, export rebates, or currency manipulation. In 2002, the industry sought and won trade sanctions under the Bush administration in the form of anti-dumping and countervailing duties ranging from 8 percent to 30 percent.⁵⁵ Those sanctions were later reversed after the World Trade Organization decided in 2003 that they were illegal, and key trading partners threatened retaliatory duties on various U.S.-made products.⁵⁶ In the wake of that decision, companies have focused on the pursuit of individual product sanctions in the form of antidumping and countervailing duty orders; approximately 127 such steel product orders are currently active.⁵⁷ In addition to the pursuit of these individual orders, the industry argues strong enforcement of current trade laws is essential to its health. Of particular importance are addressing currency manipulation and enforcement of existing antidumping and countervailing duty law.⁵⁸ In addition, the industry seeks a legislative remedy to address the circumvention of existing antidumping and countervailing duty orders by misrepresentation of products or country of origin.

Characterizing today's market as a "trade war," Richard Harshman, Chairman, President, and CEO of Allegheny Technologies, lamented that the U.S. steel industry's foreign competitors engage in "pervasive unfair trade practices," which grant foreign competitors access to low-cost capital, making it difficult for the domestic industry to compete.⁵⁹ According to Ed Kurasz, Executive Vice President of Allied Tube and Conduit, the Chinese government illegally subsidizes its steel industry making Chinese-made steel available "at ridiculously low dumped and subsidized process."⁶⁰ Despite several successful World Trade Organization cases, Kurasz testified that the Chinese engage in "significant evasion of these orders through transshipment and misclassification" and the risk is existential. He explained, "Without action against massive subsidized Chinese overcapacity and without strong trade law enforcement that our extremely competitive U.S. pipe and tube industry will largely disappear in the next decade." John Ferriola, President and CEO of Nucor, concluded, "If our system of trade is going to work and be fair for all participants, we must use every tool at our disposal to enforce [the] rules."⁶¹

⁵⁵ *Bush imposes steel tariffs*, USA Today, Mar. 5, 2002

<<http://usatoday30.usatoday.com/money/general/2002/03/05/bush-steel.htm>>.

⁵⁶ Congressional Research Service, *Trade Remedies: A Primer* at 28 (Mar. 6, 2012).

⁵⁷ U.S. International Trade Commission. *Antidumping and Countervailing Duty Orders in Place as of May 29, 2014*, (visited December 17, 2014) <http://www.usitc.gov/trade_remedy/documents/orders.xls>.

⁵⁸ American Iron and Steel Institute, *2014 Public Policy Agenda* at 4 (February 6, 2014)

<http://www.steel.org/sitecore/content/Steel_org/Document%20Types/Policy%20Featured/2014%20Public%20Policy%20Agenda.aspx>.

⁵⁹ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: The Strength of Steel* (Harshman, Richard; March 21, 2013).

⁶⁰ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: The Strength of Steel* (Kurasz, Ed; March 21, 2013).

⁶¹ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: The Strength of Steel* (Ferriola, John; March 21, 2013).

The latest essential input to modern manufacturing is data. And as U.S. manufacturers increase their footprints across the globe, they rely more and more on a stable, global Internet. For manufacturers, data over the Internet supports basic business functions such as tracking goods through the supply chain, internal company e-mails, and international personnel management. Unfortunately, several countries have adopted or are considering protectionist policies that would limit data flows across their borders. For example, Brazil has proposed a law that would have allowed the government to require data to be stored inside the country.⁶² National Association of Manufacturers Vice President Linda Dempsey testified that for manufacturers, this kind of policy “raises costs and would potentially force companies to make the choice between doing business in a particular country . . . or choose not to do business because they do not want the risk of data being held locally.”⁶³

Perhaps most concerning is that these barriers to trade tend to disproportionately affect small manufacturers. As eBay’s Brian Bieron testified, “Small enterprises are generally less able to afford the additional costs that data localization imposes and would be less able to engage in global trade using the Internet.”⁶⁴ Protecting manufacturers’ unencumbered use of data is vitally important and should be a top priority for U.S. negotiators forging free trade agreements with our trade partners. A recent International Trade Commission report estimated that our GDP could see an increase of between \$16.7 and \$41.4 billion if digital trade barriers are removed.⁶⁵ The removal of these barriers and the accompanying expansion could mean thousands of jobs and could play a significant role in the revitalization of U.S. manufacturing.

Skills Gap – STEM and Immigration

Today’s manufacturing is no longer limited to blue collar labor; the jobs increasingly rely on complex machines requiring technical skills and a basic competence in science and math – skills today’s U.S. workforce lacks, creating a critical mismatch between capital investment and a capable workforce. The resulting shortfall is referred to as the “skills gap” and creates an economic and public policy problem: operating at less than full productive capacity can severely restrict a company’s ability to grow and remain competitive. As that problem expands from a company or two to an entire industry, the economy at large becomes less productive and less competitive.

Although there is not a precise definition of what constitutes a STEM job, the Economics and Statistics Administration estimated there were 7.6 million STEM workers in

⁶² U.S. House Subcomm. on Commerce, Manufacturing, and Trade, Cross Border Data Flows: Could Foreign Protectionism Hurt U.S. Jobs? (Menghetti Dempsey, Linda; September 17, 2014).

⁶³ *Id.*

⁶⁴ U.S. House Subcomm. On Commerce, Manufacturing, and Trade, Cross Border Data Flows: Could Foreign Protectionism Hurt U.S. Jobs? (Bieron, Brian; September 17, 2014).

⁶⁵ United States International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 1 (July 2013).

the United States during 2010 based on 50 occupation codes.⁶⁶ Just as manufacturing jobs pay more than non-manufacturing jobs on average, STEM workers also command wage premiums of 26 percent over non-STEM workers. The wage premium is even more striking for STEM positions requiring less than a college degree: those workers command a 40 to 60 percent wage premium over their non-STEM counterparts. STEM workers also enjoy lower average unemployment rates. The importance of these skills is demonstrated by the fact that STEM jobs grew three times faster than non-STEM jobs between 2000 and 2010.⁶⁷ STEM jobs are projected to grow by 17 percent between 2008 and 2018, which likely explains why 56 percent of manufacturing executives believe their skilled workforce shortage will increase over the next three to five years.

For many manufacturers, the type of positions that remain unfilled range from skilled STEM positions (positions that require STEM education but less than a four year degree; e.g., machinists and technicians) to graduate and post-graduate positions (e.g., computer scientists and mechanical engineers). In partnership with Deloitte & Touche, the Manufacturing Institute released a study in 2011 on this issue. The report cites 67 percent of surveyed corporate respondents reported a “moderate to severe shortage” of qualified workers.⁶⁸ The top two categories identified by respondents as having a negative impact on their business were a shortage of skilled production workers such as machinists and technicians (74 percent) and a shortage of production support positions such as industrial and manufacturing engineers (42 percent) – the two categories that require the most training and are the hardest to fill but are also the most important to fuel innovation and productivity.⁶⁹ In order of severity, the most serious workforce deficiencies identified by respondents were a lack of basic problem-solving skills; lack of basic technical training; inadequate employability skills such as timeliness and work ethic; and inadequate technology, computer, math, reading, writing, and communication skills.

Witnesses before the subcommittees not only described the lack of available STEM-educated workers, but they also expressed serious concerns about their ability to meet future workforce needs. While this may not be the most immediate problem facing the industry, it is perhaps the most significant long-term structural problem the industry faces. Similarly, while respondents in the Deloitte study revealed nearly 600,000 open manufacturing positions remain unfilled, they also revealed an expectation that the skills gap will further widen in the coming years due to public opinion about manufacturing among the rising generation of workers. Manufacturing ranked last as an industry in which

⁶⁶ “STEM: Good Jobs Now and in the Future,” Economics and Statistics Administration, U.S. Department of Commerce, accessed October 28, 2013, available at http://www.esa.doc.gov/sites/default/files/reports/documents/stemfinaljuly14_1.pdf.

⁶⁷ “STEM: Good Jobs Now and in the Future,” Economics and Statistics Administration, U.S. Department of Commerce, accessed October 28, 2013, available at http://www.esa.doc.gov/sites/default/files/reports/documents/stemfinaljuly14_1.pdf.

⁶⁸ Deloitte and the Manufacturing Institute, *Boiling Point? The skills gap in U.S. manufacturing* (2011) http://www.themanufacturinginstitute.org/~media/A07730B2A798437D98501E798C2E13AA/2011_Skills_Gap_Report.pdf.

⁶⁹ “Boiling Point? The skills gap in U.S. manufacturing,” A report on talent in the manufacturing industry, sponsored by Deloitte and The Manufacturing Institute, accessed July 17, 2014, available at <http://www.themanufacturinginstitute.org/~media/A07730B2A798437D98501E798C2E13AA.ashx>.

18-24 year olds would choose a career – resulting in a shortfall of as many as 700,000 unfilled jobs by 2020.

These concerns were echoed throughout the Nation of Builders hearing series. According to Chris Nielsen, President of Toyota Motor Manufacturing Texas, “Nationally, 600,000 skilled technical jobs are currently unfilled... and for those advanced jobs, only 5 percent of our candidate pool is qualified.”⁷⁰ From the housing sector, Edward Martin, President and CEO of Tilson Home Corporation, identified heating, ventilation, and air conditioning (HVAC) as having the most acute labor shortages, testifying that, “On average, it is taking my company a month longer to build our homes, which adds to our costs and makes it more difficult to satisfy our customers.”⁷¹ That problem could worsen before it gets better due to an aging workforce; a master plumber, for instance, is 56-years old on average.⁷² These labor shortages are the product of structural misalignment and require an all-of-the-above solution. There are both short and long term challenges that must be addressed. In the long term, policymakers must address education shortfalls; in the short term, the widening skills gap leads many manufacturers to advocate for some form of immigration reform.

While there are federal efforts to address the lack of STEM skills in our workforce, it’s not clear those efforts are adequate or successful. Estimates vary widely but there exist between 105 and 252 STEM education activities or programs conducted by 13 to 15 federal agencies, costing an estimated \$2.8 billion to \$3.4 billion in annual spending on the identified programs.⁷³ In May 2013, the administration released a 5-year strategic plan to address and coordinate these STEM efforts across federal agencies through the Office of Science and Technology Policy (OSTP). In addition to the federal efforts, there are countless individual companies that fund scholarships, partner with universities and community colleges, and provide their own workforce education and training programs. It is these programs that appear to have the best success rate.

According to the Economic Policy Institute, among college-educated individuals under the age of 25, unemployment is at 8.5 percent and underemployment is at 16.8 percent.⁷⁴ To reduce unemployment, the educational system must adapt to employment trends, and both educators and employers must find ways to bridge that gap. This begins at the high school level where vocational education is underrepresented in favor of college prep and college transfer programs. First, manufacturers recommend an increased emphasis on STEM programs at the K-12 level. On the higher education front,

⁷⁰ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (Nielsen, Chris; April 10, 2013).

⁷¹ U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Home Economics* (Martin, Edward; Date: June 4, 2013).

⁷² U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Home Economics* (Martin, Edward; Date: June 4, 2013).

⁷³ Gonzalez, Heather B. and Kuenzi, Jeffrey J., “Science, Technology, Engineering, and Mathematics (STEM) Education: A Primer,” Congressional Research Service, April 5, 2013.

⁷⁴ Heidi Shierholz, Alyssa Davis, and Will Kimball, EPI Briefing Paper: *The Class of 2014, The Weak Economy is Idling Too Many Young Graduates* (May 1, 2014) <<http://www.epi.org/publication/class-of-2014/>>.

manufacturers push STEM and collaborative research programs. As Joseph Hinrichs described it, “Partnership with universities is critical to get the new technology that is out there... The one thing we need to do is get back to emphasizing the innovation comes from science, engineering, and math and make that a priority with our students.”⁷⁵ To meet technical and factory needs, Chris Nielsen testified that there needs to be a focus on workforce programs that produce national, portable credentials for the next generation of skilled manufacturers and tradespersons.⁷⁶ Collaboration with local community colleges and nearby manufacturers is the most direct approach, and there was unanimity that more such programs are needed.

In addition to smart changes to our educational system, a number of witnesses urged smart, comprehensive, federal immigration policy that efficiently processes the applications of qualified workers, with possible waivers for H-1B workers. American manufacturers need STEM skilled employees to grow, and the labor market today simply does not meet their needs. Edward Martin, President and CEO of Tilson Home Corporation, encouraged Congress to look at immigration reform as an opportunity to spur economic growth by filling currently unfilled positions because, “Despite our efforts to recruit and train American workers, there is still a worker shortage, which is a very real obstacle to our industry’s full recovery as work is delayed or canceled due to this shortage.”⁷⁷ Work visas for graduates of U.S. colleges and universities with science and engineering degrees would help fill that gap. Without sufficient legal pathways to semiskilled or unskilled employment in the United States, foreign bad actors are incentivized to enter and work in the United States illegally to meet employer demand. A two-pronged approach combining measures to strengthen borders and cap visas or worker permits around fluctuating demand would reduce project holdups, lower home prices, and provide a legal alternative for immigrants that want to work in the United States. In other manufacturing sectors, raising the cap and expediting the H-1B process would promote innovation, allow companies to grow, and enable the United States to retain the next generation of research and development advancements.

Access to Inexpensive Energy Resources

Equally important as addressing previously outlined barriers to a manufacturing recovery is the need to protect the advantages U.S. manufacturers currently enjoy. The most important building block today to a manufacturing recovery is access to affordable energy. In 2010, the U.S. became the top natural gas-producing nation in the world. The Potential Gas Committee’s latest biennial assessment placed the total technically recoverable natural gas resource base in the U.S. at 2,384 trillion cubic feet (Tcf) as of end

⁷⁵ U.S. House Subcomm. On Commerce, Manufacturing, and Trade, *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (Hinrichs, Joseph; April 10, 2013).

⁷⁶ U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (Nielsen, Chris; Date: April 10, 2013).

⁷⁷ U.S. House. Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Home Economics* (Martin, Edward; Date: June 4, 2013).

of 2012.⁷⁸ Due in large part to advanced extraction techniques that greatly increased our domestic production of natural gas, energy costs in the U.S. are now a fraction of those in Europe and Asia. According to John Surma, while 6 million British Thermal Units (MMBTU) in the U.S. cost \$25, the same amount of energy in Europe would cost approximately \$75.⁷⁹ To further illustrate the growing cost advantage of U.S. energy, in 2007, the cost of natural gas in the U.S. was 20 percent less than in Europe; today, the cost is 75 percent less than in Europe.⁸⁰ Decreasing energy costs and efficiency savings in the U.S. are combining to make energy expenditures on manufacturing relatively cheaper than abroad, contributing to enhanced U.S. competitiveness and fostering what has been called the “manufacturing renaissance.”

The benefits of lower energy prices include increased output, employment, and wealth, as well as lower trade deficits. Within the manufacturing sector, energy may be used as fuel (as a source of heat and power) or as a feedstock (as a material constituting part of the final product), particularly in the petrochemical industry. The natural gas revolution also means increased production of supplies and machinery to aid in natural gas exploration and recovery. After decades of declining manufacturing employment - due in part to greater productivity, increased global competition, and offshored production - domestic manufacturers are reestablishing operations in the U.S. while foreign-based manufacturers invest in new plants in the U.S. in order to make the most of this critical advantage. For example, Caterpillar recently built a new 600,000-square-foot hydraulic excavator manufacturing facility in Victoria, Texas.⁸¹ GE also moved a portion of its production from China to the U.S.; moving these operations to Kentucky reportedly resulted in “a 20 percent lower sticker price for final products, higher quality, and reduced lead times from factory to warehouse.”⁸² Since 2009, chemical giant BASF “channeled more than \$5.7 billion into new investments in North America, including a formic acid plant under construction in Louisiana.”⁸³ Rolls-Royce began production in Virginia of engine parts destined for European and Asian jet engine factories, and Siemens began building power-plant turbines in North Carolina to be shipped to Saudi Arabia and Mexico.⁸⁴ Nucor

⁷⁸ Potential Gas Committee, “Potential Supply of Natural Gas in the United States” (April 9, 2013)

<<http://potentialgas.org/press-release>>.

⁷⁹ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, Our Nation of Builders: The Strength of Steel (Surma, John; Date: March 21, 2013).

⁸⁰ David Sims, ThomasNet News, Is the U.S. the next low-cost manufacturing company? (April 16, 2013).

<<http://news.thomasnet.com/IMT/2013/04/16/is-the-u-s-the-next-low-cost-manufacturing-country/>> (accessed July 18, 2014).

⁸¹ David Sims, ThomasNet News, Is the U.S. the next low-cost manufacturing company? (April 16, 2013).

<<http://news.thomasnet.com/IMT/2013/04/16/is-the-u-s-the-next-low-cost-manufacturing-country/>> (accessed July 18, 2014).

⁸² David Sims, ThomasNet News, Is the U.S. the next low-cost manufacturing company? (April 16, 2013).

<<http://news.thomasnet.com/IMT/2013/04/16/is-the-u-s-the-next-low-cost-manufacturing-country/>> (accessed July 18, 2014).

⁸³ Michael Birnbaum, The Washington Post, European industry flocks to U.S. to take advantage of cheaper gas (April 1, 2013) <http://www.washingtonpost.com/world/europe/european-industry-flocks-to-cheap-us-gas/2013/04/01/454d06ea-8a2c-11e2-98d9-3012c1cd8d1e_story.html> (accessed July 18, 2014).

⁸⁴ Paul Davidson, USA Today, Foreign Manufacturers Bringing Jobs to U.S.

<<http://www.usatoday.com/story/money/business/2013/05/15/foreign-manufacturers-bringing-jobs-to-us/2070327/>> (accessed July 18, 2014).

began construction of a \$750 million plant in Louisiana – creating 600 construction and 150 full-time permanent manufacturing jobs – but that “would not have happened without an abundant and affordable supply of natural gas” according to John Ferriola.⁸⁵ Dean Cordle, President and CEO of AC&S, testified that the “abundant and affordable supply natural of gas has transformed the U.S. chemical industry from the world’s high-cost producer 5 years ago to the world’s low cost producer today.”⁸⁶ He directly attributed “abundant and affordable oil and natural gas” for the expansion of his business, concluding that the “shale gas revolution has transformed our company.”

It is critically important that policymakers adopt policies that allow for continued access to abundant energy resources. According to James Steiner, anything that increases the cost of energy “makes us less competitive and that is an advantage we have over other areas of the world.”⁸⁷ Joseph Hinrichs testified similarly that, because auto manufacturing is so energy intensive, “one of the most exciting things happening in the United State... is... natural gas” and that “the ability to lower energy costs in the United States would help make automotive manufacturing in America more competitive.”⁸⁸ Drew Greenblatt went so far as to say “[t]he USA has hit the lottery. This energy blessing will create a lot of jobs.”⁸⁹ He also attributed the growth of his company from 18 to 29 employees and from \$800,000 to \$5 million in annual sales to domestic energy production in two ways – both lower costs and also higher revenue from selling equipment to the gas industry. Greenblatt said that when manufacturers pay less for materials, “we are more competitive when we compete head to head against China, when we compete head to head against Japan, Germany, and Canada.”

Conclusion

The same market forces that contributed to the manufacturing sector’s contraction—relatively high costs of production and overextended credit to upstream value-added producers and consumers—are finally turning in favor of U.S. manufacturers. U.S. auto manufacturers produced nearly 8.7 million vehicles in 2011, second most in the world.⁹⁰ U.S. steel employment is over 150,000, up from 100,000 in 2000. Home starts are up, prices are rising, and home improvement spending shows steady growth, and the housing market overall should continue a gradual recovery according to the Joint Center

⁸⁵ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: The Strength of Steel* (Ferriola, John; Date: March 21, 2013).

⁸⁶ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *U.S. Energy Abundance: Manufacturing Competitiveness and America’s Energy Advantage* (Cordle, Dean; June 20, 2013).

⁸⁷ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Manufacturing in America* (Steiner, John R.; Date: February 14, 2013).

⁸⁸ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *Our Nation of Builders: Powering U.S. Automobile Manufacturing Forward* (Hinrichs, Joseph R.; Date: April 10, 2013).

⁸⁹ U.S. House Subcomm. on Commerce, Manufacturing, and Trade, *U.S. Energy Abundance: Manufacturing Competitiveness and America’s Energy Advantage* (Greenblatt, Drew; Date: June 20, 2013).

⁹⁰ China produced 18.4 million vehicles in 2011. Ranking third, fourth, and fifth are Japan (8.4 million), Germany (6.3 million), and South Korea (4.7 million), respectively. Wards Auto Group, *World Vehicle Production in Major Countries* (2012).

for Housing Studies.⁹¹ Energy costs are decreasing relative to abroad, influencing producers' bottom lines for fueling, feedstock, and shipping. Offshoring corporations are now onshoring, as evidenced by the stories of Caterpillar, GE, BASF, Rolls-Royce, and others.

Overall, the industry now employs 12 million Americans across all sectors. This nascent manufacturing recovery is due in large part to recent discoveries of large, affordable, and recoverable deposits of natural gas within the United States. It is critical that policymakers employ regulatory restraint in that arena as well as employ an all-of-the-above approach to energy to keep costs affordable. It is this competitive cost advantage that incentivizes producers to base and keep their manufacturing operations in the U.S., increasing scale and employment across all sectors. This cost advantage can easily be negated, however, by unnecessary and burdensome regulation. Policymakers must realize that regulations are not without cost, and that any potential benefits be balanced by such costs – an analysis that must be conducted with sound science and fact at the core. It is also critical that we address our current tax rate – the highest of any developed country in the world – if we want to both retain and attract investment. We are a nation of builders. When manufacturing thrives, the entire nation thrives.

⁹¹ Joint Center for Housing Studies at Harvard University, “The State of the Nation’s Housing 2014,” <<http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/sonhr14-color-full.pdf>> (visited December 18, 2014).

The Medicaid Check Up: Reasons for Reform

Originally Released March 18, 2013

Introduction

Medicaid, a shared state-federal program created in 1965, was originally designed as a safety net for low-income Americans, primarily dependent children, the blind and disabled. Surprising to most, Medicaid today covers more Americans than any other government-run health care program, including Medicare. While the program covered approximately four million people in its first year, today, there are nearly 60 million Americans enrolled in Medicaid.¹

It is important to understand the state of the program today, so that Congress can make the improvements necessary to sustain Medicaid for the nation's most vulnerable. Before the annual cost of Medicaid doubles over the next 10 years, state governments and federal policymakers should have a clear picture of how the program serves its current enrollees.

This paper reviews critical Medicaid program components to provide a better understanding of the program's original purpose and analyzes Medicaid's strengths and weaknesses in serving the nation's most vulnerable citizens. The goals of this review are to assess whether Medicaid beneficiaries get the appropriate, high-quality care their privately insured counterparts receive and what a dramatic expansion of Medicaid means for the program. The review puts Medicaid through a series of "check-ups" to evaluate the program against financial, bureaucratic, access, quality and program integrity criteria. The conclusion: the Medicaid program is in serious jeopardy and this country's most vulnerable citizens deserve better health care options.

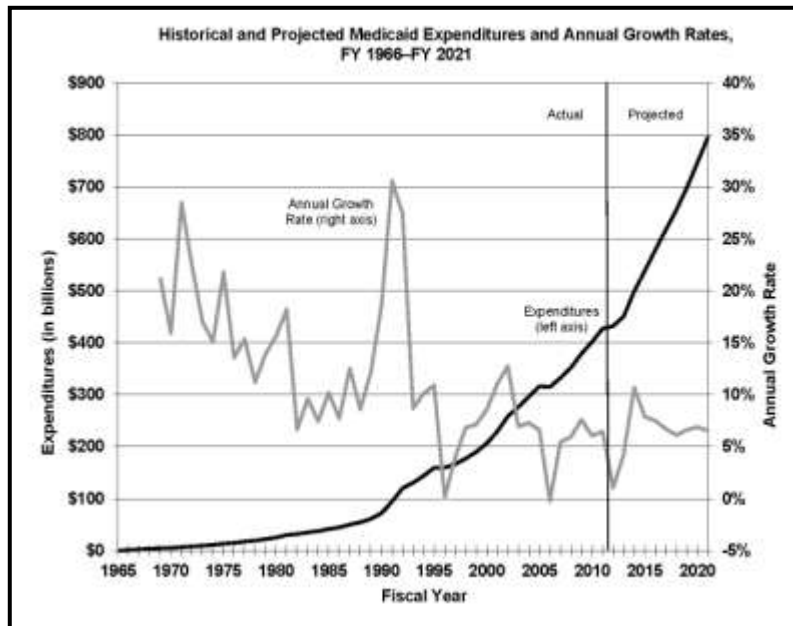
A Review of Medicaid's Original Intent and a Financial Check-Up

According to the Congressional Budget Office (CBO), the federal government will spend nearly \$5 trillion on Medicaid over the next 10 years - a substantial contributor to the growing national debt.² And at the state level, Medicaid spending now consumes nearly one-quarter of most state expenditures - a significant driver of state budget crises.³

¹ Office of the Actuary, CMS. "2012 Actuarial Report on the Financial Outlook for Medicaid." March 2012. Available online at <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf>.

² Congressional Budget Office. Medicaid- 2013 baseline. Available online at <http://cbo.gov/sites/default/files/cbofiles/attachments/43885-Medicaid.pdf>.

³ National Association of State Budget Officers (NASBO). NASBO State Expenditure Report. December 20, 2012. Available online at http://www.nasbo.org/sites/default/files/Summary%20-%20State%20Expenditure%20Report_0.pdf.



In a March 2012 report, the Centers for Medicare and Medicaid Services (CMS) Chief Actuary projected that states would spend an approximate \$2.5 trillion over the next 10 years to fund their Medicaid programs. As the CMS chart on the left shows, total annual Medicaid spending grew to over \$400 billion by its 45th year in operation (1965-2010). CMS further estimates that in the next ten years, the implementation of the president's stimulus package in 2010 and the president's Patient Protection and

Affordable Care Act (PPACA) will require a doubling in annual Medicaid spending -- from approximately \$400 billion in 2010 to approximately \$800 billion by 2021.⁴

When fully implemented, the president's health care law will result in the single largest expansion in the program's history as one American in four becomes a Medicaid recipient over the next 10 years. As a result of PPACA, this sudden expansion jeopardizes the program's initial purpose as a safety-net program for the most vulnerable.

Rather than creating affordable health care coverage choices for the uninsured, the president's health care law could force nearly 26 million adults and other newly eligible Americans into the already strained safety net program.⁵ Historically, eligibility for Medicaid has been limited mainly to specific categories, including children in poor families, the poorest seniors, low-income pregnant women, and the blind and disabled. Federal Medicaid rules to date generally prohibit use of federal Medicaid dollars to cover adults without dependent children (with some exceptions through special waivers or other eligibility circumstances). With the addition of the newly eligible PPACA adults, the program's demographics will change dramatically.

The expanded Medicaid population is expected to include relatively healthy beneficiaries as well as a significant number of individuals with multiple chronic health care needs. Researchers have concluded that the health care needs of the new populations are unknown but could certainly be costly and include individuals with significant mental

⁴ Office of the Actuary, CMS. "2012 Actuarial Report on the Financial Outlook for Medicaid." March 2012. Available online at <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf>,

⁵ Ibid.

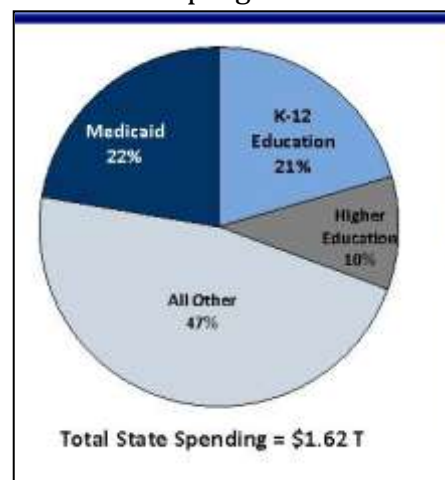
health/substance abuse problems.⁶ According to an August 2010 policy brief by the Center for Health Care Strategies, “there is reason to believe that the criminal justice system may become an active source of Medicaid enrollment post-expansion, particularly for the subset of offenders with charges related to substance abuse... many of these offenders may become newly eligible for Medicaid in 2014 once they leave the criminal justice system.”⁷

The projected enrollment and expenditures associated with the expansion populations are staggering. Another important unknown lies with the impact such an expansion might have on the quality of care provided to current beneficiaries and those categories of individuals the program was originally intended to serve.

According to CBO’s February 2013 estimates, federal taxpayers could spend as much as \$638 billion over 10 years to fund the president’s expansion of the Medicaid program.⁸ Recent estimates from the CMS Chief Actuary note that states collectively could spend \$60 billion, on top of what they already spend, over the same period to cover the cost of the expansion population.⁹

States are already facing significant budget deficits. Especially for those that are required to balance their budgets, the decision to expand the Medicaid program is not a choice states can make based only on the possibility of acquiring billions of dollars in new federal funding over the next 10 years.

As the graphic illustrates, Medicaid surpassed K-12 education in total Fiscal Year (FY) 2010 state spending.¹⁰ State budgets are under significant pressure and according to recent reports, more than a quarter of states were forced to cut Medicaid funding to balance their budgets; they see no relief in sight.¹¹ In fact, a 2010 study by the Deloitte Center for Health Solutions predicted that by 2030, Medicaid will account for up to 35 percent of spending in some states.¹²



⁶ Verdier, James M. “Extending Medicaid Coverage to Low-Income Childless Adults.” Mathematica Policy Research. July 15, 2011. Available online at: http://www.mathematica-mpr.com/publications/PDFs/health/childless_adults_verdier_%20071511.pdf.

⁷ Somers, Stephen A. “Covering Low-Income Childless Adults in Medicaid: Experiences from Selected States.” Center for Health Care Strategies. August 2010. Available online at: http://www.chcs.org/usr_doc/Medicaid_Expansion_Brief.pdf.

⁸ Congressional Budget Office. “Estimate of the Budgetary Effects of the Insurance Coverage Provisions in the Affordable Care Act,” February 2013. Available online at http://cbo.gov/sites/default/files/cbofiles/attachments/43900_ACAInsuranceCoverageEffects.pdf.

⁹ Office of the Actuary, CMS. “2012 Actuarial Report on the Financial Outlook for Medicaid.” March 2012. Available online at <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf>.

¹⁰ Kaiser Family Foundation. “State Fiscal Conditions and Medicaid.” February 2012. Available online at: <http://www.kff.org/medicaid/upload/7580-08.pdf>.

¹¹ Galewitz, Phil. “13 States Cut Medicaid to Balance Budgets” July 24, 2012. Available online at: <http://www.kaiserhealthnews.org/Stories/2012/July/25/medicaid-cuts.aspx>.

¹² Deloitte. “Issue Brief: Medicaid Long-Term Care: The Ticking Time Bomb.” June 2010. Available online at: http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/US_CHS_2010LTCinMedicaid_062110.pdf

Paradoxically, as spending for education is squeezed, the health status of the population is expected to decline because research indicates that less educated people are less aware of health issues. According to a Robert Wood Johnson Foundation Issues Brief examining the social determinants of health, “A large body of evidence links education with health, even when other factors like income are taken into account.”¹³ Expanding health care may subsequently worsen the health of the nation’s most needy. With states facing billions in tax shortfalls due to a poor economic recovery, the shocking cost projections for the next expansion of Medicaid are looming over future health care.

Looking ahead, states will have to weigh any decision to expand their Medicaid programs against the existing financial pressure to serve the program’s current and eligible beneficiaries. Cost estimates of expanding services for the new populations must take into account the added market effects that could bring millions of previously-eligible, but not enrolled Americans into the program – adding potentially billions more to a state’s tab.¹⁴ Governors and legislatures must recognize that every Medicaid dollar spent on an able-bodied, childless adult in the expansion population is potentially a future dollar diverted from the poorest and sickest children and seniors enrolled currently.

A Bureaucracy Check-Up: Revisiting the Federal-State Partnership

Since its creation, the Medicaid program has been a federal-state partnership based on the financial understanding that at least a portion of every state dollar would be matched by federal funds in exchange for the state’s agreement to operate and manage its own program under certain federal rules and criteria. Over time, however, the level of flexibility afforded to the states has been restricted, thereby reducing the ability of states to adjust their programs in the face of societal and economic changes.

The limited flexibility afforded to states has given state officials little choice but to watch, almost from the sidelines, as Medicaid has consumed more and more of their state resources. Instead of allowing state and local officials the flexibility to best administer Medicaid, the federal government has created an extensive “one-size fits-all” maze of federal mandates and administrative requirements. This is neither fair nor efficient to those most in need.

A strong indicator of such overreach was the inclusion of the federal mandate on all states to expand their Medicaid programs in the president’s health care law, struck down by the Supreme Court in 2012. There is a laundry list of other state mandates– making it more difficult for governors and states to operate their programs to best protect enrollees. For example, the Maintenance of Effort (MOE) mandate hampers states trying to streamline their eligibility review processes to curb misuse in the programs. Additionally, the Obama administration has attempted to dictate how states now pay providers, and

¹³ Robert Wood Johnson Foundation. “Education Matters for Health.” Issue Brief Series: Exploring the Social Determinants of Health. Available online at: <http://www.rwjf.org/content/dam/web-assets/2011/05/education-matters-for-health>.

¹⁴ The woodwork effect occurs when individuals who were previously eligible for Medicaid (before PPACA), but who had not enrolled, would be drawn to enroll with the increased publicity to enroll newly eligible poor childless adults.

under the president's health care law, benefits for the new expansion populations will be directly tied to federal mandates, which could cost states significantly. Those mandates - on top of the long-standing mandatory guidelines for benefits, eligibility, and financing -- have only intensified the governors' calls for relief through comprehensive Medicaid reform.

In 2011, the Republican Governors Association (RGA) released a set of Medicaid reform principles. In their challenge to the federal government, the governors (representing 29 states) called on their federal partners to acknowledge that, "no issue is more important to fixing our nation's healthcare system than improving Medicaid...Governors must be given the flexibility to craft solutions based on their states' specific needs without constantly needing to ask the federal government for permission."¹⁵

"This practice must stop if Governors are to contain costs and provide a safety net for our citizens; we know their needs far better than the federal government. We cannot do the jobs we were elected to do while continuing to be hampered by a federal program that stifles innovation and handcuffs state flexibility."

- Governors Perry of Texas, McDonnell of Virginia, and Christie of New Jersey

Many states have sought to take advantage of one of the only forms of relief available to them: waivers granted by the federal government. Moreover, faced with the bureaucratic complexity and escalating costs of the Medicaid program, states sought to make more efficient use of Medicaid dollars by such means as managed care. While any relief from the Medicaid program's restrictions is appreciated by the states, the waiver process itself is a source of great dissatisfaction and is often complex, costly and extremely lengthy. The program's centralized micromanagement, complex bureaucratic requirements, and outdated service delivery are often cited by the states as impeding their ability to provide the quality health coverage, patient responsiveness, and efficient administration common in the private sector. As a result, states have long sought enhanced operational flexibility so that they can better meet the health care needs of their most vulnerable residents.

The call from states for greater flexibility has been reiterated by Republican and Democrat governors alike for nearly 20 years.¹⁶ Washington rejects such requests at its own peril.

An Access Check-Up: Medicaid Enrollees Already Face Challenges in Accessing Care

While states are increasingly concerned with the growing cost of the Medicaid program, beneficiaries and providers alike are concerned that the dramatic expansion of the program could further weaken an already-strained network of providers willing to accept Medicaid patients. The problem is two-fold: providers are increasingly unwilling to

¹⁵ Republican Governors Association. Letter to Chairman Upton and Senator Hatch. "GOP Govs Unveil Medicaid Reform Principles." June 13, 2011. Available online at <http://www.rga.org/homepage/gop-govs-unveil-medicaid-reform-principles/>.

¹⁶ National Governors Association, "Restructuring Medicaid: Concepts, Issues, and Alternatives." Staff Paper. July 24, 1995. Available online at: <http://www.clintonlibrary.gov/assets/storage/Research%20-%20Digital%20Library/jenningssubject/Box%200008/647860-flexibility-medicaid-managed-care-3.pdf>.

accept Medicaid beneficiaries as patients and Medicaid beneficiaries are less likely to receive primary care in an appropriate setting—both examples of why this broken system needs to be changed.

In a recent analysis, economist Sandra Decker found that only 70 percent of physicians would accept Medicaid patients in 2011. According to reports, “That number was significantly lower than those accepting privately-insured subscribers (81 percent) or Medicare patients (83 percent), indicating that this wasn’t just about doctors being overbooked – it was specific to the Medicaid program.” Additional studies also show that Medicaid beneficiaries face more difficulties scheduling adequate and timely follow-up care after initial treatment for an illness than those with private insurance.¹⁷ Whether it is the initial challenge of finding a primary care physician who will accept them or one who will help with follow-up care, Medicaid beneficiaries are at an unfair disadvantage when compared with other coverage groups. That lack of preventive care often leads to more significant chronic care needs and higher mortality.

Exacerbating these problems is the web of bureaucratic restrictions placed on states, including the MOE provision included in the president’s health care law. In a February 3, 2011, letter to states, U.S. Department of Health and Human Services (HHS) Secretary Kathleen Sebelius noted the PPACA limitations and instead directed states to consider reducing “what benefits are covered, how providers are paid, and how care is delivered.”¹⁸ As a result, states facing balanced budget challenges have been forced to either eliminate or reduce optional benefits or cut provider reimbursement rates. According to the Kaiser Family Foundation, in FY2012, at least 45 states made changes to their provider payments (see figure below).¹⁹ As provider willingness to accept Medicaid declines, patients find themselves receiving care in more costly and inefficient health care settings, such as emergency rooms.

	Provider Payments	Pharmacy Controls	Benefit Reductions	Eligibility Cuts	Copays	Changes to Application and Renewal	LTC
United States	45+DC Yes	38 Yes	17+DC Yes	3 Yes	14 Yes	1 Yes	11 Yes

A recent study found that current Medicaid enrollees are twice as likely to report difficulty in accessing primary care services than those with private insurance. Researchers have noted: “The shortage of primary care providers in the U.S. seems to affect Medicaid patients disproportionately and more harshly.”²⁰ That same study found that Medicaid patients are twice as likely to visit the emergency room as those with private health

¹⁷ Lindsey Tanner, “Study Says Uninsured Lack Follow-Up Care,” Associated Press, September 13, 2005. Available online at: www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301221_2.html.

¹⁸ HHS Letter to states, “Sebelius outlines state flexibility and federal support available for Medicaid-Full Letter.” HHS Press Release. February 3, 2011. Available online at: <http://www.hhs.gov/news/press/2011pres/01/20110203c.html>.

¹⁹ Kaiser Family Foundation. “Medicaid Cost Containment Actions Taken by States, FY2012.” Available online at <http://www.statehealthfacts.org/comparetable.jsp?ind=188&cat=4>

²⁰ Annals of Emergency Medicine. “Medicaid Patients Struggle to Get Primary Care, Visit ERs More.” March 14, 2012. Available online at: <http://www.acep.org/Content.aspx?id=84318>.

insurance – a finding reinforced by the now famous Oregon Health Insurance Experiment, where researchers found Medicaid coverage did not result in a “significant change in emergency room utilization.”²¹ With nearly 26 million more Americans joining the ranks of the Medicaid program over the next 10 years, where will these individuals go for care? And is it fair to subject even more Americans to a system that isn’t working as well as many private insurance plans?

A Quality Check-Up: Pay More, Get Less

Despite the nearly half trillion dollars spent on Medicaid each year, its enrollees face limited access to care. Researchers have also found that the Medicaid program provides relatively poor quality of care and inadequate follow-up care to its nearly 60 million current enrollees. The studies provide an often dismal review, concluding that Medicaid recipients don’t receive the care they need before chronic disease onset and such lack of primary care often results in higher mortality and costlier care.

In fact, a 2008 study in the Archives of Internal Medicine found that only half of the Medicaid enrollees studied actually received adequate screening procedures for colorectal, breast, or cervical cancer.²² A more recent study by the University of Virginia (UVA) found, “that surgical patients on Medicaid are 13 percent more likely to die than those with no insurance at all, and 97 percent more likely to die than those with private insurance.”²³ As the UVA study found and numerous subsequent studies confirmed, delay in access to care and late diagnosis leads to higher mortality rates causing “[p]atients enrolled in Medicaid [to] have worse survival rates than those with private insurance or even no insurance at all.”²⁴

Medicaid patients are also less likely to receive the benefit of high-quality innovative therapies. For example, “patients with non-ST segment elevation acute coronary syndromes (NSTSE ACS), a form of heart attack, benefit significantly from innovative therapeutic approaches, including early invasive management strategies. These measures have now been incorporated into the guidelines of the American College of Cardiology and the American Heart Association. According to a study in the Annals of Internal Medicine, however, Medicaid patients with NSTSE ACS were less likely to receive evidence-based therapies and had worse outcomes (including increased mortality rates) than patients who had private insurance as the primary payer...the most important

²¹ Baicker, Katherine. “The Effects of Medicaid Coverage-Learning from the Oregon Experiment.” July 20, 2011. Available online at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3321578/>.

²² Preidt, Robert. “Cancer Screenings for Medicaid Patients Miss Targets.” ABC News. October 15, 2008. Available online at: http://abcnews.go.com/Health/Healthday/story?id=6033191&page=1#.UGDG_I0ia5I.

²³ Roy, Avik. “UVA Study: Surgical Patients on Medicaid are 13% More Likely to Die Than Those Without Insurance.” July 27, 2010. Available online at <http://www.nationalreview.com/critical-condition/231147/uva-study-surgical-patients-medicaid-are-13-more-likely-die-those-without->.

²⁴ Artz, Kenneth. “Study: For Patients Battling Cancer, Medicaid is Worse Than Being Uninsured.” Heartland Institute. March 20, 2012. Available online at: <http://news.heartland.org/newspaper-article/2012/03/20/study-patients-battling-cancer-medicaid-worse-being-uninsured>.

predictor of treatment and outcome in the study was whether the patient had Medicaid or private insurance.”²⁵

Program Integrity Check-Up: How Does Medicaid Work?

Given the high cost and poor quality of the services provided by Medicaid, it is important to also review the Medicaid program’s vulnerability to fraud, waste, and abuse. The Medicaid program has been classified as a high-error risk program by the Government Accountability Office (GAO).



PROGRAM	IMPROPER PAYMENTS
Medicare Fee-for-Service	\$28.8B
Medicaid	\$21.9B
Unemployment Insurance (UI)	\$13.7B
Medicare Advantage (Part C)	\$12.4B

According to the president’s Office of Management and Budget, Medicaid generated more than \$21.9 billion in improper payments in 2011 (see graphic on right) – including more than \$15 billion in overpayments due to eligibility review errors alone.

The examples of program integrity concerns range from simple physician billing errors to sophisticated fraud schemes, costing the program billions of dollars. Rather than promoting greater integrity in the program, the president’s health care law imposes significant restrictions on states wishing to improve their eligibility verification systems and ultimately, broadens the opportunity for greater fraud, waste and abuse in the program. Every dollar that is misplaced or mismanaged in the Medicaid program is another dollar that could have provided care for the nation’s most vulnerable – the core mission of the program since its inception.

Conclusion

The purpose of this analysis is to review where the Medicaid program fails its enrollees in providing high-quality care and to highlight the level of funds invested in the program today and the trillions more taxpayers will spend if the president’s health care law is fully implemented. As confirmed in the “check-ups” covered in this report, the program is failing in critical areas. We can do much better in providing high quality health care for the poorest and sickest among us, and we must.

With federal debt at an all-time high of \$16 trillion and states being crushed by their exploding budgets, the value of the Medicaid program will be increasingly scrutinized. Its future ability to provide coverage for the neediest will depend on its ability to compete with state spending for education, transportation, and public safety. Moreover, as states determine whether or not they will move forward with a program expansion in 2014, they should recognize the risky investment as Washington may not be able to keep its promise to continue the generous funding of the expansion population for long and states will be left with the tab.

²⁵ O’Shea, John. “More Medicaid Means Less Quality health Care.” Heritage Foundation. Available online at http://www.heritage.org/research/reports/2007/03/more-medicare-means-less-quality-health-care#_ftn6.

While the program was enacted with a promise that the federal government would pick up much of the added cost of adding millions more Americans to the Medicaid rolls, costs may eventually be passed along to the states. In either case, such an expansion is projected to cost over a trillion dollars and potentially weaken an already strained program intended to serve our most vulnerable fellow citizens.

Energy and Commerce Committee Republicans remain committed to modernizing the Medicaid program so that it is sustained and protected for our poorest and sickest citizens. We will continue to fight for those citizens because they are currently subjected to a broken system. The program needs true reform, and we can no longer simply tinker around the edges with policies that add on to the bureaucratic layers that decrease access, prohibit innovation, and fail to provide better health care for the poor. Instead, this committee will review and support policies that allow states to build upon their best practices to ensure the Medicaid program is more responsive to those who depend on this program so we can ensure their improved access to high-quality care and a better life.

Making Medicaid Work

Protect the Vulnerable, Offer Individualized Care, and Reduce Costs

Originally Released May 1, 2013

By House Energy and Commerce Committee Chairman Fred Upton and Senate Finance Committee Ranking Member Orrin Hatch

Executive Summary

Medicaid, a state-federal partnership program created in 1965, was designed as a safety net for the most vulnerable Americans. While the program covered just four million people in its first year, today, there are approximately 68 million Medicaid enrollees¹ – more recipients than any other government health care program, including Medicare. That is nearly one out of every four Americans. The data show that the size and costs of today's Medicaid are compromising the program's mission. Unequivocally, if Medicaid is to continue fulfilling its safety net mission to the country's most vulnerable, the program must be fixed.

One of the most successful, bipartisan repairs to an American safety net program was the Personal Responsibility and Work Opportunity Reconciliation Act of the 1990s – more commonly known as welfare reform. Solutions for sustainable welfare reform came from the states – not one-size-fits-all social engineering from Washington – and the same model of federalism will work to fix Medicaid. This joint congressional committee blueprint, *Making Medicaid Work*, is based on careful analysis of the extensive feedback from the states, input from providers and patients, and the reality of the country's fiscal condition. It seeks to modernize the Medicaid program in two primary ways: (1) equipping states to implement patient-centered reforms; and, (2) imposing fiscal discipline in the program.

First and foremost, Medicaid reform should be about improving the quality of care offered to enrollees. While politicians promise care and benefits, the antiquated Medicaid program does not deliver the level of quality patients deserve. *Making Medicaid Work* offers states new tools to implement innovative, patient-centered reforms. States could design individualized benefit packages based on proven, successful models like value-based insurance design or the benefit package offered to Members of Congress. The blueprint would also encourage states to reform their health care delivery systems through increased provider transparency and value-based purchasing. States choosing to expand coordinated care would also be able to expand more quickly than under current law and do so free from current statutory barriers. Under the blueprint, the federal government would prioritize responding to bold ideas from forward-thinking states to improve the quality of care in their Medicaid programs.

¹ Congressional Budget Office (CBO). The 2012 Long-Term Budget Outlook. June 2012. Available online at http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-05-Long-Term_Budget_Outlook_2.pdf

Currently, federal taxpayers are required by law to match whatever state politicians spend on Medicaid. This open ended liability is a significant risk to the program's future financial soundness. The federal share of Medicaid spending as a share of the economy is set to grow by 25 percent over the next 10 years,² with total federal spending during that time reaching nearly \$5 trillion.³ Meanwhile, Medicaid represents the single largest portion of state budgets crowding out other important investments such as education.⁴ In response to these challenges, this blueprint proposes the adoption of per capita caps, a proposal that has been advocated by politicians across the ideological spectrum from President Bill Clinton to former Senator Phil Gramm, to implement desperately needed fiscal discipline in Medicaid while preserving access to care for beneficiaries.

Introduction

Medicaid, a state-federal partnership program created in 1965, was designed as a safety net to secure care for low-income Americans, primarily pregnant women, dependent children, the blind, and the disabled. While the program covered just four million people in its first year, today, there are approximately 68 million Americans enrolled in Medicaid⁵ – more enrollees than any other government health care program, including Medicare. With the implementation of the Patient Protection and Affordable Care Act (PPACA), enrollment could grow by nearly 26 million– resulting in the largest expansion of the program in history.⁶ The data show that the size and costs of today's Medicaid are compromising the program's safety net mission for those in need.

Under today's program, the country's most vulnerable citizens have difficulty in accessing quality healthcare. A recent analysis published in *Health Affairs* found that only 69.4 percent of physicians accept Medicaid patients compared to more than 80 percent of physicians accepting privately insured patients.⁷ According to the Government Accountability Office (GAO), nearly half of children currently enrolled in Medicaid and the Children's Health Insurance Program (CHIP) are not receiving basic preventive care – even though the program requires those benefits. GAO went on to say, "Two nationally representative surveys from 2007 suggest that many children in Medicaid and CHIP needing care coordination did not receive it, and many needing access to networks of care

² Office of Management & Budget. "Summary Tables for Fiscal Year 2014." Available online at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/tables.pdf>

³ CBO. Medicaid, February 2013 Baseline. Available online at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43885-Medicaid.pdf>

⁴ Centers for Medicare & Medicaid Services (CMS), Office of the Actuary (OACT). 2012 Actuarial Report on the Financial Outlook for Medicaid. Available online at <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf>

⁵ Congressional Budget Office (CBO). The 2012 Long-Term Budget Outlook. June 2012. Available online at http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-05-Long-Term_Budget_Outlook_2.pdf

⁶ Centers for Medicare & Medicaid Services (CMS), Office of the Actuary (OACT). 2011 Actuarial Report on the Financial Outlook for Medicaid. Available online at <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2011.pdf>

⁷ Decker, Sandra L. "In 2011 nearly one-third of physicians said they would not accept new Medicaid patients, but rising fees may help." *Health Affairs* 31.8 (2012): 1673-1679. Available online at <http://content.healthaffairs.org/content/31/8/1673.full.pdf+html>

had a problem with accessing the needed services....”⁸ The lack of preventive care often leads to more significant chronic care needs and higher mortality. Another study from the University of Virginia found, “that surgical patients on Medicaid are 13 percent more likely to die than those with no insurance at all, and 97 percent more likely to die than those with private insurance.”⁹ Now that the program has expanded beyond its original mission, its resources are spread too thinly to provide quality care to those who need it. Without serious reform, the quality of the safety net will only worsen.

Unfortunately, the quality issues plaguing the Medicaid program are not surprising given the constant interference from politicians, bureaucrats, and lobbyists in Washington. Innovative states are routinely stopped from improving patient care thanks to bureaucratic hurdles and special interests. For example, Oklahoma recently learned that federal political officials would terminate the state’s long-standing and successful premium assistance program known as Insure Oklahoma, which last year provided private coverage for more than 20,000 adults in the state because CMS believed the program’s purpose had expired in light of PPACA implementation.

Medicaid, a program run by bureaucrats at multiple levels of government, has been on the GAO’s high risk program list for years. The program wastes more than \$30 billion per year on improper payments draining scarce resources from patient care.¹⁰ Given the program’s shared funding structure, patient care improvements get lost in the tug-of-war between federal bureaucrats and state politicians.

Not only is Medicaid failing patients, the program’s financial troubles threaten economic opportunity. Federal Medicaid spending alone will reach nearly \$5 trillion over the next decade¹¹ – a significant driver of the compounding debt burden facing the next generation of Americans considering the nearly \$17 trillion debt that Americans currently live under.¹² The financial challenges are not just a federal debt-driver, but a state taxpayer liability as well.

But the financial sword of Damocles is not just future federal spending; states will spend an additional \$2.5 trillion on Medicaid over the next 10 years as well.¹³ According to the National Governors Association, “Medicaid represents the single largest portion of total

⁸ Government Accountability Office (GAO). Medicaid and CHIP: Reports for Monitoring Children’s Health Care Services Need Improvement. GAO-11-293R. April 5, 2011. Available online at <http://www.gao.gov/new.items/d11293r.pdf>

⁹ Roy, Avik. Why Medicaid is a Humanitarian Catastrophe. Forbes. March 2, 2011. Available online at <http://www.forbes.com/sites/aroy/2011/03/02/why-medicaid-is-a-humanitarian-catastrophe/>

¹⁰ GAO. “The Medicaid Program (Information as it appears in the 2013 High Risk Report). Available online at http://www.gao.gov/highrisk/medicaid_program#t=1

¹¹ CBO. Medicaid, February 2013 Baseline. Available online at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43885-Medicaid.pdf>

¹² TreasuryDirect. The Debt to the Penny and Who Holds It. April 18, 2013. Available online at <http://www.treasurydirect.gov/NP/BPDLogin?application=np>

¹³ CMS, OACT. 2012 Actuarial Report on the Financial Outlook for Medicaid. Available online at <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf>

state spending....”¹⁴ To fund Medicaid, states cut critical investments in education, which threatens the nation’s ability to compete in the global economy.

Moreover, Medicaid’s open-ended funding structure sets up the wrong set of incentives. Instead of a structure that drives innovation, the status quo is full of incentives for state politicians to maximize the share of Medicaid funded by federal taxpayers. In order to drive innovation that benefits patients and lowers costs, reforms are needed to financially align payments to states.

Unequivocally, if Medicaid is to continue fulfilling its safety net mission to the country’s most vulnerable, the program must be fixed.

One of the most successful, bipartisan repairs to an American safety net was the Personal Responsibility and Work Opportunity Reconciliation Act of the 1990s. Solutions for sustainable welfare reform came from the states – not one-size-fits-all social engineering from Washington – and the same model of federalism will work to fix Medicaid. To that end, in May 2011, Representative Fred Upton, the Chairman of the House Energy and Commerce Committee and Senator Orrin Hatch, the Ranking Member of the Senate Finance Committee, wrote to the governors of all 50 states and the U.S. territories:

“Our goal is to empower the states to design and implement innovative Medicaid solutions that work for their states. Medicaid must be reformed to better serve its beneficiaries and to better use taxpayer dollars, and “We” ask you to join us in a comprehensive effort. You have run Medicaid programs and are in the best position to tell Washington how to fix Medicaid.”¹⁵

Many states have pioneered Medicaid reforms – such as West Virginia’s personal responsibility emphasis, New York’s efforts to better coordinate care for dual eligible beneficiaries, Pennsylvania’s initiative to care for individuals with mental health conditions, and Florida’s patient choice improvements – and national reforms should build on these successes.

In response to those requests, the majority of the nation’s governors outlined seven principles for true innovation and results in the Medicaid program. The governors said, “We must reassess and focus our efforts on reshaping how healthcare is delivered through innovation, creativity and responsibility – all demonstrated capabilities of states. We must bring the antiquated Medicaid program into the 21st century and secure the program’s long-term integrity.”

¹⁴ National Governors Association (NGA). The Fiscal Survey of the States. Spring 2012. Available online at <http://www.nga.org/files/live/sites/NGA/files/pdf/FSS1206.PDF>

¹⁵ Committee on Energy and Commerce and Senate Finance Committee. Congressional Leaders Seek Governors’ Feedback to Improve Medicaid.” May 23, 2011. Copy of letter available online at <http://energycommerce.house.gov/press-release/congressional-leaders-seek-governors-feedback-improve-medicaid>

The governors also published a landmark report, *A New Medicaid: A Flexible, Innovative and Accountable Future*, with 31 solutions to, “develop a better and more efficient Medicaid system, one that gives states greater flexibility, spurs delivery innovation, encourages greater accountability, and reduces the cost of the program to states and the federal government alike.”¹⁶

This joint congressional committee blueprint, *Making Medicaid Work*, is based on careful analysis of the extensive feedback from the states, input from providers and patients, and the facts about the country’s fiscal condition. It seeks to modernize the Medicaid program in two primary ways: 1) equipping states to implement patient-centered reforms and 2) implementing fiscal discipline in the program.

We must improve the quality of care for our nation’s most vulnerable citizens by providing states new tools to implement innovative, patient-centered reforms based on models with proven success and in a way that fosters future innovation. There are many ways to implement fiscal discipline in the Medicaid program, such as block grants that cap the amount of spending the federal government sends to states and proposals that limit the amount of federal dollars spent for each Medicaid beneficiary (per capita caps). This blueprint proposes a bipartisan solution similar to a proposal put forward by President Bill Clinton in 1995 and one that has had the support of conservatives such as former Senators including Phil Gramm (R-TX) and the late Jesse Helms (R-NC). Putting the Medicaid program on a sustainable budget with per capita caps will establish transparent funding streams for states to meet the individual health care needs of distinct Medicaid population categories.

GOAL 1: EMPOWER STATES TO IMPLEMENT INNOVATIVE, PATIENT-CENTERED REFORMS

First and foremost, Medicaid reform should be about improving the quality of care offered to benefit recipients. The antiquated Medicaid program does not deliver the level of quality patients deserve. We must begin by identifying which regulatory barriers prohibit states from designing benefits to address the healthcare challenges of each distinct Medicaid population and then offer states new tools to implement innovative, patient-centered reforms.

Encourage Individualized Benefit Designs

In identifying the healthcare needs of each Medicaid population group, states need the flexibility to design appropriate benefit structures to meet the needs of their enrollees in a quality-driven, cost-effective, and efficient manner. Recognizing that one solution will not work for every state nor every Medicaid population, this blueprint offers states a menu of options from which to design benefits.

¹⁶ Republican Governors Association (RGA), Public Policy Committee. “A New Medicaid: A Flexible, Innovative and Accountable Future.” August 30, 2011. Available online at http://www.scribd.com/fullscreen/63596104?access_key=key-16dzhu6py6idfkjml8it

- ✓ Additional Benchmark Benefit Design Options: Under CHIP, states have long been permitted to choose from several “benchmark plans” in designing coverage options: the state’s largest non-Medicaid or private coverage HMO, the state’s employee health plan, the BlueCross BlueShield plan offered to Members of Congress and federal employees, or an innovative plan approved by the Secretary of Health and Human Services (HHS). Building upon the intent of the reforms in the Deficit Reduction Act of 2005 (DRA), this proposal would ensure states have the same set of plan design options for Medicaid beneficiaries as they historically have had for CHIP recipients. Specifically, the benchmark plans under Section 1937 of the Social Security Act would work independently of additional federal regulatory requirements and new mandates imposed by PPACA.
- ✓ Value-Based Insurance Design: Many private employers and insurers have successfully lowered health care costs and improved patient outcomes through value-based insurance design (V-BID). According to a recent policy paper from the University of Michigan’s Center for Value-Based Insurance Design, “The basic V-BID premise is to align patients’ out-of-pocket costs, such as copayments and deductibles, with the value—not the cost—of health services. Thus, the more beneficial the service, the lower the patients’ out-of-pocket cost. By reducing barriers to high-value services (through lower costs to patients) and discouraging low-value services (through higher costs to patients), V-BID plans can achieve better health outcomes at any level of health care expenditure.”¹⁷ This policy proposal would allow states to offer V-BID plans to Medicaid beneficiaries as a way of structuring patient incentives around high-value providers.
- ✓ Assistance to Enroll in Private Coverage: The Medicaid statute has long included provisions to allow states to offer premium assistance to beneficiaries, but the bureaucratic hurdles to implementation have prevented the vast majority of states from offering the promise of private coverage to Medicaid recipients. This proposal would allow states to offer premium assistance programs that provide recipients the opportunity to receive benefits equivalent to private coverage (without additional federal restrictions) offered in the individual market or by an employer. States would be able to enroll all eligible family members in a premium assistance plan to enhance care coordination and provider continuity among family members.
- ✓ Specialty Plans: In many states, the majority of Medicaid spending goes toward a small number of high-cost, complex-need individuals. In fact, according to one study, four percent of Medicaid enrollees accounted for 48 percent of the costs.¹⁸ Based on feedback from governors and the success of models such as Special Needs Plans (SNPs) in Medicare, this proposal would allow states to invest in unique care-

¹⁷ V-BID Center Brief. “The Evidence for V-BID: Validating an Intuitive Concept.” November 2012. Available online at <http://www.sph.umich.edu/vbidcenter/publications/pdfs/V-BID%20brief%20Evidence%20Nov2012.pdf>

¹⁸ Kaiser Family Foundation. “Profile of Medicaid’s High Cost Populations.” December 2006. Available online at <http://www.kff.org/medicaid/upload/7565.pdf>

coordination and benefit design approaches for recipients with high costs and complex care needs. States would be able to passively enroll these beneficiaries in these specialty plans and design benefit packages to coordinate their complex health care needs.

- ✓ Basic Primary Care Benefits: Rather than being confined to a one-size-fits-all benefit package that can be cost-prohibitive, this proposal would give states the ability to offer limited benefit packages to address population health care needs specific to their state. Under a 2002 Section 1115 waiver, the state of Utah obtained the ability to offer primary care benefits in order to address specific population health care needs.
- ✓ Enhanced Coordination for Mental Health Conditions: Medicaid is the single largest payer of behavioral and mental health services, and many states have led the way in designing innovative approaches to improve this care. One state-led initiative in Pennsylvania sought to better align physical and behavioral care services, and the early results have demonstrated reductions in hospitalizations, hospital readmissions, and emergency room visits.¹⁹ This proposal would build on the success of the Pennsylvania pilot program by giving states the tools to better integrate physical and behavioral care services (through aligning provider payments) and allowing provider data sharing (by aligning existing regulations regarding the exchange of treatment and care coordination information with the Health Insurance Portability and Accountability Act Privacy Rule).
- ✓ Healthy Behavior Framework: Studies have consistently shown Medicaid enrollees utilize less efficient settings to receive health care services. Despite efforts to expand primary care programs, a recent study published in the *Journal of the American Medical Association* found that costly emergency department (ED), “visit rates have increased from 1997 to 2007 and that EDs are increasingly serving as the safety net for medically underserved patients, particularly adults with Medicaid.”²⁰ In an effort to improve care, improve patient safety, and reduce costs, governors have asked for more flexibility to ensure services and health care settings are being used to optimize public health outcomes.
 - o *Enhanced Benefit Accounts*: States should be granted the ability to implement incentive-based models that reward beneficiaries for healthy behaviors and practices that improve their care and reduce the overall costs to the program. States should be granted greater flexibility to implement “value-added” services or financial incentives for individuals to make healthy decisions, such as selecting a low-cost plan or following treatment regimens.

¹⁹ Center for Health Care Strategies. “Medicaid Pilot Program Demonstrates Decrease in Emergency Department Visits and Hospitalizations for Patients with Serious Mental Illness.” October 1, 2012. Available online at http://www.chcs.org/info-url3969/info-url_show.htm?doc_id=1261430

²⁰ Tang, Ning. “Trends and Characteristics of US Emergency Department Visits, 1997-2007. The Journal of the American Medical Association (JAMA). August 11, 2010. Available online at <http://jama.jamanetwork.com/article.aspx?articleid=186383>

States should be able to build on successful models such as the Florida Enhanced Benefit Accounts, where enrollees receive incentive payments through program adherence to be used by enrollees for additional services, products and cost-sharing expenses. In West Virginia, added plan benefits are incentives for enrollees agreeing to adhere to certain healthy behaviors; and, in Idaho, studies have shown that financial incentives have worked in, “improving the proportion of children with up-to-date well-child visits.”²¹

- o *Appropriate Cost-Sharing*: Under current law, Medicaid cost-sharing is allowable with significant limitations. This blueprint would allow states maximum flexibility in designing a cost-sharing framework across all health care services and incomes. When carefully designed, cost-sharing can be an important tool to encourage patients to follow treatment regimens, receive primary care services instead of unnecessary emergency room utilization, and seek higher value health care services. States would have the ability to develop and test enforcement mechanisms to ensure program effectiveness.
- o *Shared Responsibility*: States should be allowed to impose premiums on enrollees to ensure patients’ shared ownership in health care decisions. Even under PPACA, low-income individuals will be responsible for at least two percent of the costs of their health care benefits through the new insurance Exchanges, and this proposal would allow states to use the same tool for certain Medicaid populations. Under this policy, states would be allowed to charge premiums, as appropriate, and develop incentive-based benefit packages that, for example, could encourage healthy behaviors such as enrollment in certain wellness programs by decreasing premiums or nullifying them all together. The decision as to how premiums should be applied, if at all, will be left to the states.
- ✓ Consumer-Driven Options: States like Indiana have implemented benefit models that provide higher deductible plans along with a pre-funded account to cover out-of-pocket medical expenses. While beneficiaries’ accounts contain resources to ensure they receive the care they need, the approach introduces consumer incentives into the delivery of care under this model. Indiana’s plan was implemented through a Section 1115 demonstration waiver with significant limitations; this policy would statutorily authorize this model without existing barriers restricting enrollment and participation. Under this option, states would have greater flexibility to promote patient choice and raise cost awareness for appropriate enrollees.

²¹ Blumenthal KJ. “Medicaid incentive programs to encourage healthy behavior show mixed results to date and should be studied and improved.” Health Affairs. March 2013. Available online at <http://www.ncbi.nlm.nih.gov/pubmed/23459728>

Reform the Delivery System through Increased Provider Transparency and Value-Based Purchasing

- ✓ Promote Health Care Transparency: Patients in America have more access to information about the quality and prices of cars than they do about their health care providers. With so little transparency in the health care system, it is not surprising that health care costs outpace any other sector of the American economy and that patients routinely miss out on value for the dollars they spend. As recently noted in Steven Brill's article in *TIME*²² and a March 2013 *JAMA* study²³, there is significant pricing variation among similar products and services not directly attributed to quality differences. This proposal would encourage health care providers to make pricing data more widely available to health care consumers. Additionally, building on efforts to release Medicare claims data, this proposal would require states to release Medicaid claims data to certified entities for the purposes of increasing transparency about provider quality throughout the health care system. Strict protections would be in place to protect patient privacy and proprietary information. Non-government entities would be able to use this information to establish robust data sets, which may be aggregated with clinical information to the extent feasible, to evaluate provider quality and outcomes.
- ✓ Align Provider Incentives: Under traditional Medicaid fee-for-service, states separate Medicaid payments to providers for each of the individual services they furnish to beneficiaries for a single illness or course of treatment. This approach can result in fragmented care with minimal coordination across providers and health care settings. This outdated payment model rewards the quantity of services offered by providers rather than the quality of care provided. Research has shown that certain value-based payment methods can align incentives for providers – hospitals, post-acute care providers, physicians, and other practitioners – allowing them to work closely together across all specialties and settings. For example, Arkansas' Medicaid Payment Improvement Initiative provides incentives to improve care quality and efficiency and reduce Medicaid costs through episode-based payments for medical conditions including upper respiratory infections, congestive heart failure and total joint replacement. This policy would go beyond the payment demonstration authorities allowed under PPACA and allow states to implement these innovative payment approaches in appropriate geographic regions and partner with specific providers. This would foster payment arrangements with providers that include financial and performance accountability measures for episodes of care that will lead to, "higher quality, more coordinated care at a lower cost to the Medicaid program."²⁴

²² Brill, Steven. "Bitter Pill: Why Medical Bills Are Killing Us." *TIME*. March 4, 2013. Available online at <http://www.time.com/time/magazine/article/0,9171,2136864,00.html>

²³ Rosenthal, Jaime. "Availability of Consumer Prices From US Hospitals for a Common Surgical Procedure." *JAMA*. March 25, 2013. Available online at <http://archinte.jamanetwork.com/article.aspx?articleid=1569848#AuthorInformation>

²⁴ Center for Medicare & Medicaid Innovation (CMMI). "Bundled Payments for Care Improvement (BPCI) Initiative: General Information." Available online at <http://innovation.cms.gov/initiatives/bundled-payments/>

- ✓ State Ability to Set Provider Rates: The experience of federal price-setting that was put in place with the Boren amendment,²⁵ which was repealed by a bipartisan effort in the 1990s, illustrated the importance of allowing states to determine the most appropriate rates and methodologies for provider payments. States need the ability to pay providers in methods consistent with local practice patterns and budget needs. This proposal would make it clear that states have the exclusive authority to establish provider rates and preclude federal regulations that may infringe upon that right.

Improve Access to Coordinated Care

The use of managed care in Medicaid has grown steadily over the years as both states and managed care plans grow more experienced in caring for vulnerable populations. For example, between 1997 and 2009, Medicaid managed care enrollment grew from just eight million to nearly 50 million.²⁶ And nearly half of Medicaid enrollees are now in comprehensive risk-based managed care plans where the plan assumes full responsibility for patient quality and costs. According to the Medicaid and CHIP Payment and Access Commission (MACPAC), “interest continues to grow in expanding managed care to additional enrollees, especially high cost, high need populations.”²⁷ This proposal would increase access to the coordinated care offered under managed care plans in several ways.

- ✓ Offer Managed Care to More Beneficiaries: This proposal would allow states to passively enroll additional beneficiary populations, such as foster children and high cost, high need individuals, without receiving a special waiver from the federal government.
- ✓ Align Payer Incentives: The evolution of the Medicaid payment system has resulted in many unintended consequences that defy common sense. For example, some states have historically carved out inpatient services from managed care contracts simply to preserve additional federal funds offered under hospital upper payment limits (UPL). This proposal would rectify these systemic inefficiencies by requiring the Centers for Medicare and Medicaid Services (CMS) to establish model waivers

²⁵ Summary of the Boren Amendment: “From 1980 to 1997, federal law directly linked Medicaid nursing home rates with minimum federal and state quality of care standards. As part of the Omnibus Reconciliation Act of 1980, the “Boren amendment” required that Medicaid nursing home rates be “reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable state and federal laws, regulations, and quality and safety standards” (Section 1902(a)(13) of the Social Security Act). State Medicaid officials overwhelmingly came to oppose the amendment as impossible to operationalize, believing that they were forced by the courts to spend too much on nursing homes at the expense of other services. The federal Balanced Budget Act of 1997 repealed the Boren amendment, giving states far greater freedom in setting nursing home payment rates.” Summary of the Boren Amendment from the Urban Institute, available online at <http://www.urban.org/UploadedPDF/anf30.pdf>

²⁶ (MACPAC) Report to the Congress on Medicaid and CHIP. March 2011. Available online at <https://docs.google.com/viewer?a=v&pid=sites&srcid=bWFjcGFjLmdvdnxtYWNwYWN8Z3g6NTZmYjU1ZDcwMTQzMdc0MA>

²⁷ Ibid.

for states to receive defined, budget-neutral funding streams, based on their current supplemental payments, which could be aligned with per capita payments to managed care plans. A similar concept was recently approved by CMS for the state of Texas in order to facilitate the expansion of managed care.

- ✓ Improve Managed Care Payment Determination: The blueprint would direct the GAO to study and report on state Medicaid program “best practices” regarding managed care payment determination and quality measurement. The report would include evaluation of the effectiveness of actuarial soundness requirements, competitive bidding approaches, and payments based on historic cost trends. The report would also evaluate various quality measurement approaches and metrics, such as measures accredited by the Utilization Review Accreditation Commission and the National Committee for Quality Assurance.
- ✓ Preserve State Regulatory Authority: Many states have implemented their own approaches to monitoring care utilization and costs under managed care arrangements, and federal efforts to impose additional Medical Loss Ratios (MLR) may complicate those state-led efforts. This proposal would preclude the federal government from imposing a one-size-fits-all MLR upon state contracts with managed care plans.

Reduce Federal Administrative Barriers that Deter Innovation

While the flexibilities outlined above offer states an array of options to modernize Medicaid, it would be impossible to include every innovative idea in federal statute. This proposal would reform the Section 1115 waiver process to make it more responsive to forward-thinking states with bold ideas to improve their Medicaid programs. As suggested by a report from the Republican Governors Association (RGA), the waiver process would be improved to offer broad, outcomes-based Program Operating Agreements (POA) between the federal government and individual states. States would publicly and routinely report on defined outcomes instead of the status quo, which micromanages states with a laundry list of regulations. States would be held accountable on “recognized measures of quality, cost, access and customer satisfaction that reflects the states’ priorities and permits an assessment of program performance over time.”²⁸To that end, the existing Section 1115 waiver process would be reformed as follows:

- ✓ 1115 Waiver Clock: Once a state submits a waiver request to the federal government, CMS would be required to send the state a final round of questions regarding the request within 60 days and then give a final answer to the requesting state within 120 days. If productive discussions are in process, a state may offer an extension of the deadline to CMS in 30 day increments.
- ✓ Waiver Reciprocity: The Secretary of HHS would be required to approve a state waiver request if a similar waiver has previously been approved for

²⁸ See footnote 12.

another state, if such waiver would not increase federal costs. This would accelerate the adoption of innovative ideas among the states, and it would reduce the influence of political ideology in HHS decisions about waiver requests.

- ✓ Waiver Integrity Improvements: While waivers are intended to allow testing and implementation of innovative ideas in the Medicaid program, too often they have been abused to tap the federal Treasury through loopholes in “budget neutrality” rules. This proposal would require the CMS Office of the Actuary to review and approve the budget neutrality assumptions under waivers before approval.
- ✓ Innovative Practices Compendium: States often raise concerns that there are few resources that appropriately catalog and update Medicaid directors on innovations and active state demonstrations. As such, this policy would promote information sharing among states and identify an appropriate set of resources to regularly update states on pending waiver applications, existing demonstrations, and analyses of any long-standing waivers that have proven to improve quality and reduce federal and state Medicaid expenditures.

Increase the Efficiency and Effectiveness of Eligibility Determinations and Review

- ✓ Repeal of the Maintenance of Effort (MOE) Mandate: States should have the ability to better define their eligibility groups and ensure the integrity of the Medicaid program with a repeal of the burdensome MOE provision originally included in the president’s stimulus bill and later expanded in PPACA. The MOE has been a significant burden on states interested in managing their enrollment levels, implementing key cost-containment strategies, and developing new program integrity measures. Instead, the federal mandate forces governors to make deeper reductions in other key areas such as provider rates and optional benefits.
- ✓ Encourage Proper Recipient Identification: This policy would allow states greater flexibility to verify recipient identity, citizenship, and eligibility to ensure the Medicaid program remains protected for those truly eligible and most in need.

Build upon Existing Efforts to Coordinate Care for Dually-Eligible Enrollees

- ✓ Our respective committees continue to monitor the demonstration projects currently in progress through the federal Center for Medicare and Medicaid Innovation (CMMI) and throughout a broad number of states. These demonstrations are testing initiatives related to benefit structure, enrollment mechanisms, and payment alignment. We are hopeful these models will increase access to quality care and reduce costs. We support the goal of better coordinated benefits and services for the dually-eligible populations and will work to build on any success these efforts achieve.

Promote Transparent Funding Allotments for Long-Term Care Services and Supports

- ✓ With the rise in long-term care spending and the greater demand for individuals to remain in their communities, states have experimented with various approaches to reforming long term care services and supports. For example, there was bipartisan support for the Bush administration's "Money Follows the Person" demonstration programs that help states transition beneficiaries from institutions to the community.²⁹ Similarly, the state of Tennessee recently implemented its CHOICES proposal to offer beneficiaries with long-term care needs the option of receiving vital services in their homes.³⁰ This proposal would allow states to choose a defined funding allotment with enhanced state flexibility to continue building upon these successes.

Protect Benefits for Disabled Populations Currently Eligible for Medicaid

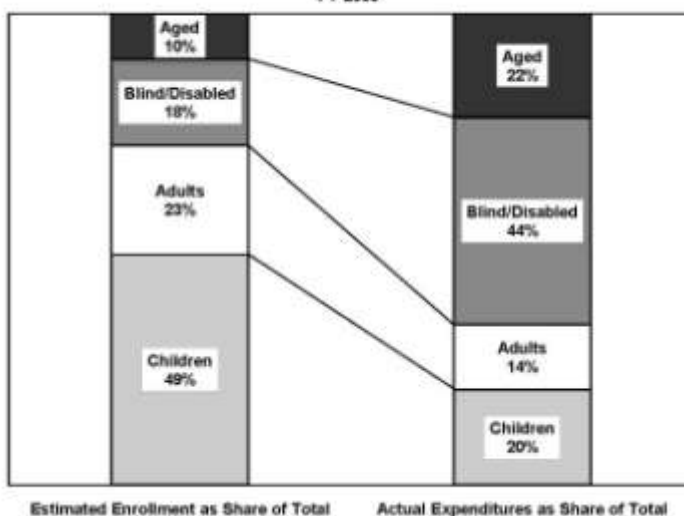
- ✓ The purpose of this proposal is to improve the quality of care offered under the Medicaid program and lower systemic costs – not to strip critical benefits away from the program's most vulnerable beneficiaries. This proposal includes a guaranteed protection of current law benefits upon which individuals with disabilities rely. Nothing in this proposal would change the longstanding entitlement to benefits for individuals with disabilities.

GOAL 2: DEFINE TRANSPARENT FUNDING STREAMS TO STATES TO MEET THE INDIVIDUAL HEALTH CARE NEEDS OF DISCRETE MEDICAID POPULATIONS.

Medicaid should not be viewed as a monolithic health care program. Today, Medicaid comprises over 50 different programs nationwide and the nearly 68 million Americans currently enrolled represent discrete population categories ranging from healthy, low-income children to poor, disabled adults, and seniors with long-term care needs.

Medicaid spending is as complex as the populations served. Figure 1 illustrates that the size of a population category does not directly relate to the expenditure levels for such categories. The more costly Medicaid populations – specifically, the

Figure 1—Medicaid Enrollment and Expenditures, by Enrollment Group, as Share of Total,¹ FY 2009



²⁹ Kaiser Family Foundation. "Money Follows The Person: A 2011 Survey of Transitions, Services and Costs." December 2011. Available online at <http://www.kff.org/medicaid/upload/8142-02-2.pdf>

³⁰ TennCare: Background on CHOICES program. "Long-Term Services & Supports Gives CHOICES." Available online at http://www.tn.gov/tenncare/long_choices.shtml

aged, blind, and disabled – require more complex health care services and are higher utilizers of care. Their health care needs, just like the distinct needs of healthy children, should be customized and targeted appropriately to improve care and reduce costs.

The federal share of Medicaid spending as a share of the economy is set to grow by 25 percent over the next 10 years,³¹ with total federal spending during that time reaching nearly \$5 trillion.³² According to the CMS Office of the Actuary, the Medicaid program is the federal government’s “largest source of general revenue-based spending on health services... a larger source of such Federal expenditures than Medicare.” Currently, federal taxpayers have an open-ended liability to match state Medicaid spending, which is a significant factor in Medicaid’s budgetary challenges.

Medicaid also represents the single largest portion of state budgets (estimated at an average 23.6 percent in FY2011).³³ An April 2013 GAO report regarding state fiscal challenges notes:

In the long term, the decline in the sector's operating balance is primarily driven by the rising health-related costs of state and local expenditures on Medicaid and the cost of health care compensation for state and local government employees and retirees. Since most state and local governments are required to balance their operating budgets, the declining fiscal conditions shown in our simulations continue to suggest that the sector would need to make substantial policy changes to avoid growing fiscal imbalances in the future. That is, absent any intervention or policy changes, state and local governments would face an increasing gap between receipts and expenditures in the coming years.³⁴

Bipartisan per capita cap reforms would insert desperately needed fiscal discipline in Medicaid while preserving access to care for beneficiaries. In testimony before the Senate Finance Committee in 1997, former Clinton administration official and HHS Secretary Donna Shalala noted, “there are absolutely no incentives for states to deny coverage to a needy individual, or to a family.... It is a sensible way to make sure that people who need Medicaid are able to receive it.”³⁵

While the fiscal health of the Medicaid program is dire, studies have also consistently shown that access to care and the quality of services provided in the program are below average. Whether it is the initial challenge of finding a primary care physician

³¹ Office of Management & Budget. “Summary Tables for Fiscal Year 2014.” Available online at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/tables.pdf>

³² See footnote 7.

³³ See footnote 9.

³⁴ GAO. “State and Local Governments’ Fiscal Outlook: April 2013 Update.” GAO-13-546SP. April 30, 2013. Available online at: <http://www.gao.gov/assets/660/654255.pdf>

³⁵ Shalala, Hon. Donna E., Ph.D. Testimony before the Senate Finance Committee regarding President's FY 1998 Budget Proposal for Medicare, Medicaid & Welfare. February 13, 1997. Available online at [http://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/http%3A\\$2f\\$2fprod.comsmos.dc4.bowker-dmz.com\\$2fapp-bin\\$2fgis-hearing\\$2fc\\$2f3\\$2f7\\$2fb\\$2fhrg-1997-fns-0015 from 1 to 393.pdf?entitlementkey=1234](http://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/http%3A$2f$2fprod.comsmos.dc4.bowker-dmz.com$2fapp-bin$2fgis-hearing$2fc$2f3$2f7$2fb$2fhrg-1997-fns-0015%20from%201%20to%20393.pdf?entitlementkey=1234)

who will accept them or one who will help with follow-up care, Medicaid beneficiaries are at an unfair disadvantage when compared with other coverage groups. That lack of preventive care often leads to more significant chronic care needs and higher mortality. We believe in a Medicaid program that better serves our nation's poorest and sickest Americans by modernizing the program to set financial incentives in a way that fosters innovation and quality care.

We can ensure the financial alignment of medical assistance payments for the needs of discrete Medicaid population categories through a per capita financial framework – one that provides budget predictability for federal and state taxpayers while protecting the investment in each Medicaid enrollee.

A per capita cap is a reasonable approach for reform that received widespread support from congressional Democrats when proposed by the Clinton administration in 1995 and promoted as, “providing states with sufficient funds to maintain coverage,” while addressing the “top concerns of governors,” around state flexibility. At the time, all 46 members of the Democratic Caucus of the Senate signed a letter to President Clinton expressing their “strong support for the Medicaid per-capita cap structure” including several currently serving Senators and then-Senator Joe Biden (D-DE). More recently, in October 2012, former Senate Majority Leader Tom Daschle (D-SD) expressed his support for Medicaid per capita caps as a way of “guaranteeing benefits on the Medicaid program.” Additionally, conservatives such as former Senators Phil Gramm (R-TX) and the late Jesse Helms (R-NC) have proposed similar legislation.³⁶

How a Per Capita Cap Model Would Work

Similar to the reforms proposed in the 1990s, federal per capita caps would be placed on the four major beneficiary groups outlined by the Congressional Budget Office (CBO): aged, blind and disabled, children, and adults. The overall federal per capita allotment would be based on the product of the state's number of enrollees in each of the four population category and the per capita amount for each population category.

- ✓ **State Base Year Per Capita Calculations:** The individual per capita calculation by population category would be based on the most recently available expenditure data and would be state-specific.³⁷ Base year federal cap amounts would be determined by each state's average medical assistance and non-benefit expenditures per full-year-equivalent enrollee. After the base year amount, caps would grow by a realistic exogenous and appropriate growth factor for each state. In an effort to correctly implement the exogenous growth factor, the Secretary would, every five years, rebase state specific per capita payments if average per capita costs have grown annually at a rate slower than the targeted growth rate.

³⁶ S.1802. “Comprehensive Family Health Access and Savings Act.” January 27, 1994. Available online at <http://www.gpo.gov/fdsys/pkg/BILLS-103s1807pcs/pdf/BILLS-103s1807pcs.pdf>

³⁷ Most recently available expenditure data for such calculation would be dependent on enactment of such model in statute.

- ✓ Geographic Spending Variation: There is significant variation in Medicaid programs across states. As such, the exogenous growth factor for states whose average per capita spending is in the top quartile of states would grow at a slower growth rate, and states whose average per capita spending is in the bottom quartile would grow at faster growth rate in an attempt to normalize per capita spending across states. The committees have worked extensively with GAO on modeling to study factors influencing spending variation by state, including historical pricing phenomena and geographic practice variation. The goal is to consider any recommendations that appropriately adjust payments in order to attempt to normalize spending across states over time.
- ✓ Continued State Investment and Data Integrity: Under this model, current federal medical assistance percentages (FMAP) rules apply and states would not be eligible for federal funds without continued state investment. CMS would project aggregate federal Medicaid expenditures for each state on a quarterly basis, and once the amount was drawn down, no additional federal funds would be available unless the state can demonstrate that actual enrollment had been higher than projected. On an annual basis, CMS would administer post facto adjustments for overpayments or underpayments to appropriately reflect enrollment levels, and states would be subject to audits and penalties for over-reporting actual enrollment data. Much like how the program works today, if a state chooses to spend above their federal per capita targets, they may use state-only dollars to fund additional Medicaid expenses.
- ✓ Risk Corridors for Disabled Per Capita Amounts: One of the goals of a federal per capita model is to ensure greater efficiency in the use of Medicaid funds. As such, states that achieve greater efficiency in the use of funds could draw down additional federal dollars up to the state's overall cap and use such funds across population categories, especially in years where new models are being implemented in certain populations and costs may be higher than average for such groups. A shared-savings and risk corridor model would be established to allow states incentive to achieve efficiencies and maintain savings from the model as well determine how to protect vulnerable populations such as the disabled from unpredictable spending above the state's cap.
- ✓ Excluded Per Capita Payments: Certain payment categories would be excluded from the caps and would be calculated through a separate funding stream, including: (1) federal payments made to states on behalf of certain dual-eligibles whose Medicaid expenses are limited to cost-sharing and premiums; (2) federal payments made to disproportionate share hospitals; (3) Graduate Medical Education payments; (4) federal payments made under the Children's Health Insurance Program (CHIP); (5) federal payments made on behalf of Indian Health Service (IHS) enrollees; (6) other partial Medicaid benefit enrollees; and, (7) other appropriate exclusions.
- ✓ Special Provisions for 1115 Waivers: Moreover, the Secretary would establish special provisions for states operating Medicaid programs under waivers in a

manner consistent with improved budget neutrality requirements as discussed previously.

- ✓ Targeted State-Determined Spending Levels: States would be allowed to cap enrollment for high income recipients if state Medicaid spending exceeded state-determined budget targets. States like New York have voluntarily imposed similar enrollment restrictions today, and this proposal would give states additional options to meet their own goals.

Rewarding Quality Improvement and Cost Effectiveness Success

The goal of the proposed per capita model is to ensure greater flexibility for states while improving budget predictability and fiscal discipline for the federal budget. While the increased flexibility is critical for states, we should ensure there is a framework in place that holds states accountable and improves the quality of care for enrollees. As such, states would be required to report on transparent achievement measures on access to care, patient outcomes, patient experience, and health care costs.

Reporting requirements would work in tandem with financial incentives for states. States that achieve certain benchmarks on cost reduction, access, and quality would be awarded bonus funding from a defined pool of federal dollars. These award funds could be used for innovative public health initiatives in the state to reduce overall health care costs, lower the incidence of chronic disease, or achieve other state health care goals.

Program Integrity Enhancements

- ✓ Lower Provider Tax Threshold: States are able to use revenues from health care provider taxes to help finance the state share of Medicaid expenditures. This effectively reduces the level of state commitment to the Medicaid program at the expense of federal taxpayers. Under current law, states are limited to a provider tax threshold of no higher than 6 percent of the net patient service revenues. Until October 1, 2011, the threshold was 5.5 percent. The president's Fiscal Year (FY) 2013 budget proposal would have phased-down the threshold to 3.5 percent. While it would not eliminate state provider taxes altogether, this proposal would adjust the provider tax threshold back to its previous 5.5 percent level.
- ✓ Increase Transparency for Medicaid Supplemental Payments: According to the GAO, "States reported \$32 billion in Medicaid supplemental payments during fiscal year 2010, but the exact amount of supplemental payments is unknown because state reporting was incomplete."³⁸ Additionally, GAO reports have found that some non-disproportionate share hospital (DSH) supplemental payments are not even being

³⁸ GAO. "Medicaid: States Reported Billions More In Supplemental Payments in Recent Years." GAO-12-694. July 20, 2012. Available online at <http://www.gao.gov/assets/600/592784.pdf>

used for Medicaid purposes.³⁹ This proposal would strengthen reporting requirements for DSH payment audits. Additionally, to address serious concerns raised by GAO, this proposal would impose reporting requirements on non-DSH supplemental payments, clarify payment policies for non-DSH supplemental funding, and require annual independent audits of states' non-DSH provider payments.⁴⁰

CONCLUSION

Congress and the nation's governors can — and will — enact comprehensive and sustainable Medicaid reform. It is time to fix the Medicaid program. We owe it to taxpayers and to the millions of vulnerable Americans that depend on the program. Governors need the flexibility to deal with the quality and spending challenges posed by Medicaid costs and the American taxpayers need a reliable safety-net program.

This blueprint is a product of significant input from the states and policy experts from a wide range of ideological positions. The committees look forward to receiving additional feedback from interested parties on how the blueprint could be improved to ensure greater innovation in the Medicaid program, increased quality of care, and reduced overall costs.

³⁹ GAO. "Medicaid: More Transparency of and Accountability for Supplemental Payments Are Needed." GAO-13-48. November 2012. Available online at <http://www.gao.gov/assets/660/650322.pdf>

⁴⁰ Ibid.

Modernizing Medicare For The 21st Century

Why Medicare is Outdated and Beneficiaries Deserve Better

Originally Released August 29, 2013

By Energy and Commerce Committee Chairman Fred Upton, Ways and Means Committee Chairman Dave Camp, E&C Health Subcommittee Chairman Joe Pitts, and W&M Health Subcommittee Chairman Kevin Brady

Introduction

Since its enactment in 1965, the Medicare program has successfully provided access to health care services for our nation's seniors and disabled. However, this access is under threat as the program's outdated benefit structure, high expenditures and projected enrollment boom could threaten the availability of Medicare for current and future generations.

The number of beneficiaries coming into Medicare as the "baby boomers" head into retirement is dramatic. While the program served 50 million Americans in 2012, enrollment could reach over 63 million Americans by 2020 and over 80 million by 2030.¹ The swell of beneficiary enrollment levels will cause Medicare expenditures to rise dramatically, adding pressure to the already struggling Medicare trust funds. The 2013 Medicare Trustees report includes the seventh consecutive Medicare funding warning and estimate that without policy action, the Medicare trust fund could become insolvent in as early as 2026,² (while earlier estimates indicated an insolvency date as soon as 2016).³

While dramatic enrollment growth, increased expenditures and draining resources are important contributors to the program's solvency crisis, so too is the program's outdated benefit structure that fails to encourage consumer involvement and often leaves beneficiaries confused and exposed to high, unlimited out-of-pocket costs. The current program relies on a 1960's era old-fashioned and complicated benefit design. Seniors deserve a modern system that is easier to understand and that will save them money.

We can, and should, take measured, short-term steps to strengthen Medicare for America's seniors by focusing on policies that have long-standing bipartisan support from a wide range of policymakers, health experts and economists. This bi-committee discussion paper is the first in a series of Medicare policy proposals that will be released over the coming months that will (1) identify key flaws of the existing traditional Medicare

¹ MedPac. "A Data Book: Health Care Spending and the Medicare program." June 2013. Available online at <http://www.medpac.gov/documents/Jun13DataBookEntireReport.pdf>

² The Board of Trustees, Federal Hospital Insurance & Federal Supplementary Medical Insurance Trust Funds. "2013 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds." Available online at <http://downloads.cms.gov/files/TR2013.pdf>

³ Roy, Avik. "Trustees: Medicare will go broke in 2016, if you exclude Obamacare's Double-Counting." Forbes. April 23, 2012. Available online at <http://www.forbes.com/sites/aroy/2012/04/23/trustees-medicare-will-go-broke-in-2016-if-you-exclude-obamacares-double-counting/>

framework and (2) further detail reform concepts for consideration and public feedback. Working together, Members of the House Energy & Commerce and Ways & Means Committees will further these ideas to initiate a discussion on how to protect seniors and place the Medicare program on sound financial footing.

This first joint paper will review (1) the traditional Medicare cost-sharing framework and the impact current thresholds have on beneficiaries – often leaving them unprotected against catastrophic costs; (2) the impact of supplemental coverage with low cost-sharing requirements that reduce incentives to seek cost-effective care; and (3) how modernizing the traditional cost-sharing features could better align beneficiary incentives, ensure beneficiaries greater out-of-pocket predictability and reduce overall Medicare costs.

A 21st Century Bipartisan Approach: Protect Beneficiaries & Reduce Costs

With a redesigned Medicare benefit, beneficiaries will have relief from the existing structure that often leaves them exposed to catastrophic out-of-pocket costs and further incentivizes over-utilization of services that directly increase costs for Medicare. Reforms should follow three simple principles:

- ✓ Make Medicare easier to navigate;
- ✓ Protect seniors; and
- ✓ Reduce costs.

Modernization of the traditional benefit structure can begin with (1) the establishment of a single combined annual deductible for Medicare Parts A & B and (2) a simplified coinsurance rate that is applicable to spending above such deductible. Reforms must protect Medicare beneficiaries from any out-of-pocket costs that exceed a defined and reasonable catastrophic limit. Finally, reform proposals must consider how existing supplemental coverage trends impact overall Medicare costs and ensure maximum beneficiary engagement and accountability in the selection of Medigap and other supplemental plans.

An Outdated Cost-Sharing Framework that Leaves Beneficiaries Vulnerable to Catastrophic Costs

The nearly 50-year old design of the Medicare program was modeled after the separate Blue Cross (hospital services) plans and Blue Shield (physician services) plans that were prevalent throughout the nation at that time. Since then, private insurance coverage has transformed dramatically, coordinating these benefits, yet the traditional Medicare benefit has remained largely unchanged – resulting in an array of confusing coinsurance and deductible levels and a “traditional” Fee-For-Service (FFS) structure that inhibits care coordination, incentivizes overutilization and results in increased costs.

As the American Academy of Actuaries (AAA) has noted, “Whereas private health insurance programs typically have integrated benefit structures that are designed to manage hospital and non-hospital expenses in a coordinated fashion, the Medicare Part A

(hospital) and Part B (physician and outpatient) benefits are structured very differently from each other – and the patient cost-sharing provisions are not coordinated between the two. This lack of coordination in the design of Medicare’s FFS benefits has important consequences for both beneficiaries and taxpayers.”⁴ (emphasis added)

Figure 1 outlines the typical 2013 cost sharing levels for a beneficiary in the traditional Medicare FFS program, which includes just over 70 percent of all Medicare beneficiaries, with the remaining portion enrolled in Medicare’s private-based Medicare Advantage program.⁵ This existing cost-sharing structure for traditional Medicare is a confusing and disjointed collection of deductibles, copayments and coinsurance, and lacks any catastrophic spending protections, a staple of many insurance products. Seeking protection from growing cost-sharing amounts, beneficiaries have increasingly sought supplemental coverage to protect themselves. MedPAC notes that the lack of comprehensive coverage is a contributing factor in over 90 percent of Medicare beneficiaries obtaining supplemental insurance – and the trend is growing.⁶

FIGURE 1: A CONFUSING AND OUTMODED BENEFIT DESIGN <i>Selected part a and part b cost-sharing requirements for 2013</i>	
Part A Hospital Stay: Skilled Nursing Facility Stay Home Health	<ul style="list-style-type: none"> • \$1,184 deductible for days 1-60 per benefit period • \$296/day copayment for days 61-90 of the spell of illness period • \$592 per day for days 91 and beyond of the spell of illness period (up to the maximum 60 “lifetime reserve days”) <ul style="list-style-type: none"> • No deductible or copayment for first 20 days. • \$141.50/day for days 21-100 of each benefit period • 100% of all costs each day beyond 100 days in a benefit period <ul style="list-style-type: none"> • No beneficiary cost-sharing
Part B Monthly Premiums Annual Deductible Physician Services: Outpatient hospital services Home Health	<ul style="list-style-type: none"> • \$104.90 to \$335.70 (depending on income) <ul style="list-style-type: none"> • \$147 <ul style="list-style-type: none"> • 20 percent coinsurance for most doctor services (including most doctor services when beneficiary is an inpatient), outpatient therapy, dialysis, and durable medical equipment <ul style="list-style-type: none"> • 20 percent coinsurance (up to hospital deductible of \$1,184) <ul style="list-style-type: none"> • No beneficiary cost-sharing
Note: There are additional cost-sharing requirements not noted here (including those for home health, hospice care, clinical laboratory and mental health services), which can be viewed at www.medicare.gov	

⁴ American Academy of Actuaries Issue Brief. “Revising Medicare’s Fee-For-Service Benefit Structure.” March 2012. Available online at http://www.actuary.org/files/Medicare_FFS_Design_Issue_Brief_03_07_12_final.pdf

⁵ See note 1.

⁶ MedPAC. “Reforming Medicare’s benefit design.” June 2012. Available online at http://www.medpac.gov/chapters/Jun12_ch01.pdf

Understanding the Growth in Supplemental Coverage and Its Current Impact on Medicare Costs

According to America's Health Insurance Plans (AHIP), 2012 enrollment "in Medigap coverage increased to 10.2 million policies...up from 9.9 million Medigap policies in force in December 2011."⁷ Medigap, however, is just one form of supplemental coverage for Medicare beneficiaries.

Supplemental plans include Medigap plans and employer-sponsored retiree plans. Low-income beneficiaries can receive supplemental benefits through Medicaid and other programs. Finally, as a fully alternative model, most beneficiaries can also choose Medicare Advantage plans that include some supplemental benefits and variations on cost sharing that are integrated in to the Medicare benefit. In 2009, less than 10 percent of Medicare beneficiaries did not have some sort of supplemental coverage.⁸

In 2009, 21 percent of beneficiaries nationwide had individually-purchased Medigap policies with another 33 percent having employer-sponsored supplemental coverage (including Medigap); the remaining beneficiaries had either Medicaid (12 percent) or were enrolled in Medicare Advantage (27 percent).⁹

To determine the role of supplemental Medigap and employer-sponsored insurance on Medicare spending, MedPAC commissioned a study in 2009. Beneficiaries often purchase Medigap plans because of the certainty these plans bring: predictable copays instead of coinsurance and protection against high out-of-pocket costs. However, largely because of the first-dollar coverage provided (some Medigap plans cover all or part of the traditional Medicare deductible and/or coinsurance), MedPAC's study found that Medicare spending was 33 percent higher when beneficiaries

BACKGROUND ON MEDIGAP PLANS:

- All Medigap plans cover some percentage of Medicare's cost-sharing. Some plans offer additions to these basics, including various combinations of greater coverage of Medicare cost sharing, and care associated with foreign travel emergencies.
- The most popular plans are the most comprehensive, and cover all deductibles, copayments, and coinsurance not covered by Medicare.
- Medigap policies are sold in both the individual and the group health insurance markets. Whether purchased in the individual or the group market, each Medigap policy covers one individual.
- Plans are identified by letter, and each plan is associated with a specific benefit package.
- Standard Medigap policies vary in how they wrap around Medicare's cost sharing and the most popular types of Medigap policies—standard Plan C and Plan F—fill in nearly all of Medicare's cost-sharing requirements, including the Part A and Part B deductibles.

Source: Rapaport, Carol. "Medigap: A Primer." Congressional Research Service. January 2013.

⁷ AHIP. "Trends in Medigap Coverage and Enrollment, 2012." May 2013. Available online at: <http://ahip.org/Trends-Medigap-Coverage-Enroll2012/>

⁸ See note 2.

⁹ See note 1.

had Medigap insurance and 17 percent higher when beneficiaries had employer-sponsored coverage. MedPAC further reported that the effects of the supplemental insurance were more pronounced for Part B spending, which ranged from 30 percent (employer-sponsored) to 50 percent (Medigap) higher. The analysis found smaller spending impacts on Part A services as a result of supplemental insurance, from 9 percent (employer-sponsored) to 18 percent (Medigap).¹⁰

Further, the 2009 MedPAC study found the greatest increase in Medicare spending was for beneficiaries with the most protection against Medicare's cost sharing. Specifically, the study found that beneficiaries who pay less than 5 percent of total Part B out-of-pocket costs had Medicare spending that was between 68 and 83 percent higher than those with traditional Medicare only. Those who paid more than 5 percent of the Part B cost sharing had Medicare spending that was 0 to 23 percent higher than Medicare-only beneficiaries. It is not surprising that those with little to no coinsurance responsibility have higher spending because if a beneficiary is already paying a monthly Medigap premium, there is an incentive for him/her to see the doctor more often because the beneficiary's out-of-pocket costs are covered by the Medigap plan (it's the "if you're paying for the coverage, you might as well use it" mentality).¹¹

This over-utilization of services directly contributes to higher costs for all seniors in Medicare. As the American Academy of Actuaries notes, reforms to the Medigap structure could, "result in an increased understanding among beneficiaries of their benefit choices, lower insurance premiums...and avoid unnecessary care."

A Real World Translation: What Would a Catastrophic Cap Mean for Ms. Smith?

Navigating the existing Medicare program is complex and, as noted above, reforms should not build on those complexities, but rather modernize the program so that it reflects a 21st century insurance product that Medicare beneficiaries are familiar with and can easily transition from their pre-Medicare insurance coverage. Below is an example of what such reforms could mean for Medicare beneficiaries in the future.

Example: Ms. Smith does not currently carry Medigap coverage. Ms. Smith has an annual household income of less than \$85,000 per year. Medicare reimburses \$7,500 for Ms. Smith's 10-day hospital stay and \$70,500 for Ms. Smith's 100-day skilled nursing facility (SNF) stay. While in the hospital and nursing home, Medicare also reimbursed \$3,100 in physician payments for Ms. Smith. The illustrative example below compares Ms. Smith's cost-sharing obligations both with and without a benefit redesign.

¹⁰ Hogan, Christopher. "Exploring the Effects of Secondary Coverage on Medicare Spending for the Elderly." Medpac. June 2009. Available online at http://www.medpac.gov/documents/Jun09_secondaryinsurance_CONTRACTOR_RS_REVISED.pdf

¹¹ See note 10.

MS. SMITH'S COST-SHARING OBLIGATIONS ^A		
	Current Medicare Benefit Out-Of-Pocket (OOP)	A Proposed Medicare Benefit Re-Design OOP
Hospital Stay <i>(assumes the hospital stay is the first claim CMS receives)</i>	\$1,184 [Medicare Part A deductible]	\$550 [Combined Medicare Parts A & B deductible] ^A
		\$1,390 [(\$7,500-\$550) = (\$6,950)] [(\$6,950)* (20%) ^B = \$1,390]
		TOTAL = \$1,940
Skilled Nursing Facility <i>(assumes CMS receives the SNF claim prior to all physician visit claims)</i>	\$11,320 [(\$141.50 co-pay)*(80 days)]	\$14,100 [(\$70,500)* (20%) ^B = \$14,100] <i>without OOP cap</i>
		\$3,560 [(\$5,500 OOP cap ^B) – (\$1,940) = \$3560] <i>Apply \$3,560 rather than \$14,100 because of OOP cap</i>
		TOTAL = \$3,560
Physician Visits	\$147 [Medicare Part B Deductible]	NONE
	\$591 [(\$3,100 - \$147) = (\$2,953)*(20% co-insurance) = \$590.60]	
	TOTAL = \$738	
TOTAL	\$13,242	\$5,500^C

^A – The monthly Part B premium would still apply under both scenarios.

^B – Several organizations have recommended combining Medicare Parts A & B with: 1) a single \$550 deductible, 2) uniform 20 percent cost-sharing, and 3) total OOP cap of \$5,500.

^C – With a total OOP cap this is the maximum Ms. Smith would pay for the full calendar year. However, under the current Medicare benefit design, Ms. Smith would still be paying additional cost-sharing for every service she receives through the remainder of the calendar year.

Bipartisan Support

These reforms are not necessarily new ideas. In fact, in 1999, the National Bipartisan Commission on the Future of Medicare noted: “Under the plan, the traditional Part A and Part B fee-for-service deductibles would be combined...this **will lower the hospital deductibles**,”¹² and the AARP Policy Institute affirmed, “**Indeed, a unified structure may be necessary to offer Medicare more flexibility to provide access to affordable, high quality care** in a continually changing health care environment.”¹³

These reforms carry long-standing bipartisan support from a wide range of policymakers, health experts, and economists. The below list is just a subset of the entities and proposals that have been released recently related to Medicare fee-for-service cost-sharing and supplemental coverage reform.

- **AMERICAN ENTERPRISE INSTITUTE (AEI)**: In December 2012, AEI released a “Medicare Makeover” report that focuses on five reforms to make Medicare “healthy.” As part of the proposal, AEI calls for an updating of Medicare’s structure so patients understand the cost of care by encouraging policy-makers to consider combining Medicare Parts A & B, altering Medigap coverage so beneficiaries are more sensitive to the cost of their medical care and increased coordination of health care services in traditional Medicare by restructuring cost-sharing for beneficiaries.
- **BIPARTISAN POLICY CENTER, “THE DOMENICI-RIVLIN DEBT REDUCTION TASK FORCE PLAN 2.0”**: Proposes unifying cost sharing for Medicare Parts A & B, creating an out-of-pocket maximum and prohibit Medigap plans from providing first dollar coverage.
- **BROOKINGS**: In April 2013, the Brookings Institute published “Bending the Curve,” a report that focused on four major strategies including transitioning to “Medicare Comprehensive Care Organizations” and reforming Medicare benefits, including elimination of first dollar coverage from Medigap. Additionally, in February 2013, **the Hamilton Project at Brookings** proposed unifying Medicare Parts A & B with a combined annual deductible of \$525 and set the coinsurance rate above the deductible equal to 20 percent up to an annual out-of-pocket maximum of \$5,250, with higher out-of-pocket limits for higher income beneficiaries and lower out-of-pocket limits for lower income beneficiaries and would apply an excise tax of up to 45 percent on Medigap plan premiums and employer-sponsored retiree coverage for beneficiaries over age 65.
- **CONGRESSIONAL BUDGET OFFICE (CBO)**: As part of its 2011 publication, “Reducing the Deficit: Spending and Revenue Options,” CBO estimated the savings

¹² National Bipartisan Commission on the Future of Medicare. “Talking Points: Breaux-Thomas Proposal.” 1999. Available online at <http://rs9.loc.gov/medicare/talking.htm>

¹³ AARP Policy Institute. “The Effects of Merging Part A and Part B of Medicare.” C.F. Caplan, D.J. Gross. 1999. Available online at http://assets.aarp.org/rgcenter/health/9901_medicare.pdf

that would be associated with redesigning the Medicare benefit and limiting first dollar coverage. Specifically, CBO looked at three options assuming implementation in 2013 (scores are over the 2012-2021 time period):

1. **Uniform Cost Sharing:** A combined Parts A and B \$550 annual deductible; 20 percent coinsurance above the deductible (including inpatient); and annual \$5,500 OOP cap. ***Estimated Savings: \$32.2 billion***
 2. **Medigap Restrictions:** Restrict Medigap plans from covering cost sharing below the deductible and limit the plan from covering no more than half of the cost-sharing between the deductible and the OOP cap. ***Estimated Savings: \$53.4 billion***
 3. **Uniform Cost Sharing and Medigap Restrictions:** This policy would implement the first two policies. Medigap plans would be restricted from paying the new \$550 deductible and could only cover 10 percent of beneficiaries cost sharing up to the new out-of-pocket cap (i.e., half of the 20 percent coinsurance under Option 1). ***Estimated Combined Savings: \$92.5 billion¹⁴***
- **HERITAGE FOUNDATION:** Proposes combining Medicare Parts A & B (with unified deductible and cost-sharing), adding a catastrophic limit and prohibiting first-dollar coverage the first \$550 of Medicare patient cost sharing from coverage by supplemental insurance.
 - **KAISER FAMILY FOUNDATION (FOUNDATION'S PROJECT ON MEDICARE'S FUTURE):** One of the proposals discussed would restructure the Medicare's benefit design with a unified deductible, modified cost sharing, and a limit on out-of-pocket spending, possibly in conjunction with policies to discourage or restrict supplemental coverage.
 - **MEDICARE PAYMENT ADVISORY COMMISSION (MEDPAC):** Proposes replacing the current benefit design with an out-of-pocket maximum; deductible(s) for Medicare Parts A & B services; replacing coinsurance with copayments that may vary by type of service and provider; secretarial authority to alter or eliminate cost sharing based on the evidence of the value of services, including cost sharing after the beneficiary has reached the out-of-pocket maximum; no change in beneficiaries' aggregate cost-sharing liability; and an additional charge on supplemental insurance.

¹⁴ Assuming no changes to supplemental insurance (Option 1), CBO estimated that 25 percent of beneficiaries would see a reduction or no change in their cost sharing while 75 percent would see some increase. Looking at changes to cost sharing and Medigap (Option 3), CBO estimated that 61 percent of beneficiaries would see lower or no change to their out of pocket spending and 40 percent would see some level of increase in their out of pocket spending.

- **PRESIDENT'S FISCAL YEAR (FY) 2014 BUDGET:** Proposes a Medigap proposal introducing a surcharge on Part B premiums equivalent to about 15 percent of the average Medigap premium for new beneficiaries that purchase Medigap policies with “particularly low cost-sharing requirements,” beginning in 2017.
- **PRESIDENT'S NATIONAL COMMISSION ON FISCAL RESPONSIBILITY & REFORM (SIMPSON-BOWLES):** Proposes unified cost-sharing for Medicare Parts A & B and prohibiting Medigap plans from covering the first \$500 of cost-sharing and limit coverage to 50% of the next \$5,000.
- **URBAN INSTITUTE:** In March 2013, the Urban Institute issued a “Timely Analysis of Immediate Health Policy Issues” report that focused on nine Medicare reforms, including a restructuring of premiums, cost-sharing and Medigap by instituting a unified Part A & B deductible that is means-tested, increasing Part B and D premiums to 40 percent, instituting a cap on cost-sharing for Medicare Parts A, B and D, and a limit on Medigap coverage.

Conclusion & Future Opportunities

The bipartisan nature of these proposals should encourage further development of policies that will modernize and improve the costly and outdated Fee-For-Service design structure and, instead, replace it with a 21st century framework that encourages consumer information and healthy behavior, protects beneficiaries against catastrophic costs and improves the overall fiscal health of the Medicare program.

In the coming months, the bi-committee process will continue its work promoting a modernized health care program for seniors by examining how reforms enacted within the last 10 years – most notably the creation of Medicare drug and insurance plans – have improved the quality and availability of health care for seniors. Such reforms are examples of the benefit that modernization can play in the health and welfare for seniors and highlight the need for additional measures to bring the program in line with the health care programs for younger Americans.

Responding to Seniors' Needs and Improving Medicare Choices

Originally Released April 11, 2013

By Energy and Commerce Committee Vice Chairman Marsha Blackburn (R-TN) and Energy and Commerce Committee Member Renee Ellmers (R-NC)

For far too long, our nation's seniors and people with disabilities have seen their health care program used as a piggy bank to fund the creation of new programs for others. Rather than ensuring Medicare remains solvent and successful for today's more than 50 million beneficiaries and for future generations, the Affordable Care Act diverted \$716 billion from Medicare to fund the largest expansion of Medicaid in history and the creation of yet another entitlement program. This \$716 billion raid on Medicare could exacerbate beneficiaries' existing challenges in accessing the health care providers of their choice and weaken private Medicare options such as the Medicare Advantage (MA) program – which today covers more than 14 million Americans.

The current Medicare program structure is unsustainable and will threaten current beneficiaries' health security if not addressed. We believe the best long-term solution is to allow for increased plan options in the Medicare program that provide seniors the Medicare benefit they receive today, while reducing costs and improving the quality of care.

We can take measured, short-term steps to strengthen Medicare for America's seniors by focusing on policies that have had long-standing bipartisan support from a wide range of policymakers, health experts, and economists. At the very least, Congress should come together to strengthen the program by: (1) fixing the Medicare physician payment system; (2) improving the program's benefit structure to provide seniors a more seamless Medicare coverage; (3) protecting the sickest seniors from medical bankruptcy; (4) reducing subsidies for high-income earners; (5) improving the program's private sector options; (6) reforming the medical liability system; and (7) eliminating waste, fraud, and abuse. Working closely with the House Ways and Means Committee, the Energy and Commerce Committee will further these efforts to protect seniors and place the Medicare program on sound financial footing.

Solutions for Seniors and Individuals with Disabilities: Protecting Health Choices, Prioritizing Access and Care

1. Fix the Medicare physician payment system so seniors can see the doctor they choose.

An essential step in strengthening Medicare for beneficiaries is ending the uncertainty created by the Sustainable Growth Rate (SGR) formula currently used for Medicare physician payments. For over a decade, seniors and physicians have been subject to increased uncertainty as Congress has used monthly or annual patches to avert

increasingly draconian reductions in Medicare payments resulting from the flawed and outdated SGR formula. Surveys have shown that the uncertainty around the SGR has caused physicians to stop accepting Medicare beneficiaries. The Committee proposes repealing the SGR and replacing it with a fiscally responsible reform of Medicare's physician payment system that ensures America's seniors and those with disabilities can use their Medicare cards to see their own doctors. To achieve this goal, collaborative efforts are underway with the Ways and Means Committee to develop meaningful reforms.

2. Provide a more seamless transition into Medicare.

For decades, the Medicare structure has led to confusion and anxiety for beneficiaries. The division between Medicare Part A (Hospital Insurance) and Part B (Medical Insurance) reflects the health insurance system of the 1960s - unfamiliar to most Americans and does not look or operate like current insurance plans - which combines medical services into one benefit package. Since we do not give seniors 1960s health care services, we should no longer provide them with a 1960s health insurance product. The Energy and Commerce Committee proposes to provide a modernized insurance design by streamlining the program's cost-sharing structure - unifying the deductibles for Medicare Parts A & B under one threshold. By streamlining cost-sharing and deductibles, beneficiaries may see less need to purchase some types of supplemental coverage, further simplifying their health care coverage. The committee will review reforms to modernize the Medigap program to ensure seniors have the incentive to make better healthcare choices and reduce Medicare costs over time.

3. Protect the sickest beneficiaries from medical bankruptcy.

Medicare's unpredictable out-of-pocket costs coupled with the threat of unlimited medical charges makes beneficiaries fear, and sometimes experience, the personal and financial devastation of medical bankruptcy. The Committee proposes to end this confusion and fear by creating a catastrophic cap on Medicare expenditures to protect seniors from bankruptcy because of unexpected health care costs, further reducing the need for some types of supplemental coverage. Such a policy, coupled with the simplification of deductibles for Medicare Parts A & B mentioned above, offers beneficiaries a more predictable and simplified cost-sharing structure.

4. Reduce subsidies for high-income earners to ensure the program's solvency.

Our Medicare program is a significant component of Americans' retirement security, and one that is essential to the most vulnerable seniors. However, without improvements, the program's approaching insolvency is undeniable. Under the current Medicare program, high-income earners pay an additional premium amount for Medicare Part B and Medicare prescription drug coverage. President Obama has supported an expansion of income-related premiums under the Medicare program. The Energy and Commerce Committee will examine how the current means-testing framework is affecting seniors, explore whether additional steps can be taken to focus resources on those seniors with the greatest need, and reassess the voluntary nature of the program to determine whether additional

flexibility can be offered – while protecting the program that seniors depend on – in order to reduce spending and ensure the financial viability of Medicare for future generations.

5. Preserve Medicare’s private option success stories: Medicare Advantage and the Medicare prescription drug program.

We should strengthen and protect the private market options in Medicare that are clearly working to improve beneficiary access to quality care and that actually reduce costs for beneficiaries and the overall program.

The Medicare Advantage (MA) program (Medicare Part C) has been a valuable choice for over 14 million beneficiaries (many of whom are minority or low-income disadvantaged seniors). MA plans offer these beneficiaries customized and supplemental benefits like vision, dental, and chronic disease management programs that improve the quality of care, fill in gaps in service, and reduce out-of-pocket costs. Yet today, the viability of MA is at risk due to deep cuts of more than \$300 billion taken from the program to fund the Affordable Care Act’s creation of other entitlements. The Committee will work to preserve the choices and benefits offered to seniors through MA.

The Medicare Prescription Drug Program (Medicare Part D) has been a true public-private partnership success in improving care and keeping costs down for seniors.¹ Under Part D, private insurers compete for seniors’ business by offering different drug coverage plans, and this competition has helped limit costs for the more than 35 million Medicare beneficiaries enrolled in prescription drug plans. The Committee remains opposed to any policies that could insert government price controls or further the government’s interference with negotiations in the Part D program. Moreover, the Committee remains committed to protecting beneficiaries from any policies that could weaken these two private market Medicare programs and is exploring how to strengthen both programs to ensure their viability in the future.

6. Reform the medical liability system to end junk lawsuits and stop enriching trial lawyers.

The nation’s medical liability system is broken, and it has imperiled patient access to healthcare and imposed tremendous costs on consumers and our nation’s federal health care programs, including Medicare. The broken system has forced doctors out of practice and caused sites of care to close, including some of our nation’s trauma centers. We need to enact comprehensive medical liability reform in connection with our federal health care programs that will improve seniors’ access to quality care while reducing overall Medicare costs.

¹ [Actual program costs](#) have come in below [original cost estimates](#).

7. Eliminate waste, fraud, and abuse to reduce costs for our nation's current seniors, while strengthening the program for future generations.

The federal government needs to do a better job of safeguarding every Medicare dollar so that it can be used to care for all Medicare beneficiaries. Unfortunately, too often Medicare dollars are lost because the federal government has failed to take the steps necessary to ensure these funds are protected against waste, fraud, and abuse. For more than a decade, Congress has sought to reduce the waste, fraud, and abuse of Medicare resources, yet the problem persists. Key recommendations of government watchdogs such as the Government Accountability Office (GAO) have been ignored, while the Centers for Medicare and Medicaid Services (CMS) has allowed – and in some instances established – institutional roadblocks that inhibit some anti-fraud efforts. As a starting point for sustainable, long-term improvements, the Energy and Commerce Committee will solicit comprehensive recommendations from government watchdog groups and others that could become the basis for bipartisan, structural reforms to Medicare and to the operations of CMS in how it conducts its waste, fraud, and abuse efforts.

Affordable Health Insurance Shouldn't be an Oxymoron

Originally Released April 5, 2013

By Reps. Joe Pitts (R-PA) and Michael C. Burgess, M.D. (R-TX), Chairman and Vice Chairman, Subcommittee on Health

When it comes to health care there are many challenges and chief among them is cost. In 2009, Congress and the nation engaged in a broad debate about the direction of federal health care reform. On our side of the aisle, we warned that not enough attention was being paid to affordability and too much focus went into expanding federal control. We all know how the story unfolded from there. Those warnings fell on deaf ears, and the president followed the partisan path to health reform.

Three years later, the president's health care law is making life more expensive. Despite President Obama's promise that premiums would decrease by \$2,500, the average family premium has grown by over \$3,000 since 2008. These increases have occurred before the law's most costly requirements go into effect in 2014. To date, over 30 studies and analysis from the Congressional Budget Office, independent actuaries, health plans, benefit consultants, and others show the cost of health care premiums will rise even more once the law is fully implemented next year.

These premium increases, combined with three decades where health care costs have doubled as a percentage of income, mean less money for groceries, child care, gasoline, college tuition, and summer vacations in the family budget. At a time of weak economic growth and slow job creation, it is unfair for Washington to make coverage less affordable for American families.

To build a health care system that is truly affordable, the Affordable Care Act must go. We can do better. Americans should be given choice in health care, not dictates from politicians and Washington agencies. Real reform means encouraging more individual choices when it comes to health coverage.

Reform is necessary to reverse the damage of the President's health care law and provide affordable coverage options to all Americans, including those with pre-existing conditions. Instead of an individual mandate that forces people to buy insurance they can't afford, low-cost coverage options should be made available to save Americans from the inevitable premium increases coming as a result of the President's health care law. These steps will also help build toward long term health insurance solutions, such as allowing Americans to purchase coverage across states lines and providing new pooling options for small businesses and individuals so they can negotiate better rates from insurance companies. Taken together these reforms will mean Americans would finally have more affordable, portable and customized health care options. This paper examines initial steps for health insurance reform that can lay a foundation for the future.

Solutions for Patients: Escaping From Rigid Federal Mandates, Prioritizing Affordability and Access

1. Create a premium increase safety valve.

While supporters of the Affordable Care Act believe their law will work, data and estimates issued to date project higher costs for most Americans buying coverage. If premiums rise more than 10 percent in a state, residents should be allowed to purchase coverage free of onerous Washington mandates. Under this scenario, states would be given flexibility to approve affordable, innovative health insurance options to shield Americans from any potential increase in health care costs. And individuals and families would be able to choose the health coverage that best fits their needs, rather than having to buy expensive insurance that includes things that they don't want or need.

2. Allow state coverage compacts.

Collaborative state partnerships should be promoted through "coverage compacts." These compacts would put two or more states in control of their insurance markets rather than the federal government imposing one-size fits all plans. There is no reason to impose burdensome federal rules when people can come to better solutions through their elected representatives working in conjunction with neighboring states.

3. Give Americans coverage options like Members of Congress have today.

Members of Congress and federal workers have access to an array of quality health coverage options under the Federal Employee Health Benefit Program (FEHBP). There is no reason every individual should not have access to these types of benefit packages moving forward. The laws creating FEHBP did not impose heavy benefit mandates on the plans available to Members of Congress and federal workers. This statutory framework can serve as the model for health care choices available to every American.

4. Ensure consumers who like their insurance can keep it.

Although the president regularly promised that if you liked your health insurance, you would be able to keep it, the law actually limits the number of pre-Obamacare plans that can continue to be offered without change. Consumer-driven options, like health plans coupled with Health Savings Accounts, continue to face challenges from Affordable Care Act Public Health Service Act requirements such as the medical loss ratio. These plans and others available prior to enactment of the Affordable Care Act in the individual and small group market should be an option to anyone wishing to purchase them. This reform would help Americans keep their plan if they like it and provide greater flexibility in coverage than otherwise available under the Affordable Care Act.

5. Prioritize coverage for Americans with pre-existing conditions over wasteful spending.

While Republicans and Democrats fundamentally disagree about the best ways to reform our health care system, there should be no question that solutions for those with pre-existing conditions should be prioritized over other wasteful Washington spending. Money should be immediately rerouted from other parts of the president's health care law to help sick Americans unfairly hurt by the administration's decision to suspend enrollment in the program designed to help those with pre-existing conditions access affordable coverage.

6. Replace price controls with market-based solutions and incentives.

The president's health care law imposes new government price controls on premiums known as guaranteed issue and community rating. While the law's proponents say these provisions are needed to guarantee access, the result is an incentive for patients to wait until they are sick to purchase coverage. Moreover, these provisions are cited by independent experts and actuaries as the major reason many Americans will see double-digit increases in their premiums. These price controls should be replaced with resources to help sick Americans find affordable coverage, such as state-based high-risk pools. We will also work to end discriminatory pricing on Americans who responsibly maintain continuous coverage by plugging loopholes in current law.

Committee's Investigation of Federal Programs Addressing Severe Mental Illness

Originally Released May 15, 2014

Background

Fifty years have passed since President Kennedy signed the Community Mental Health Centers Act (P.L. 88-164), transforming the federal government's involvement in mental health. Despite that, for too long, mental health has been a topic kept in the shadows, often going unmentioned even as one in five Americans struggle with mental illness. A study, published in August 2013, has shown that mental and substance abuse disorders are notable contributors to the global burden of disease, being responsible for more of the global burden than are HIV/AIDS, tuberculosis, diabetes, or transport injuries.¹

While the vast majority of individuals with schizophrenia, bipolar disorder, or major depression are not violent, those with untreated severe (or, used interchangeably, "serious") mental illness (SMI) are at an elevated risk of exhibiting violent behavior – two times, or greater, than the average person – directed at themselves or others.² There is considerable evidence that violent acts committed by mentally ill persons have increased over the past half century.³ The reported presence of such disorders, largely left untreated, in recent perpetrators of mass violence – including Adam Lanza, in Newtown, Connecticut, James Holmes, in Aurora, Colorado, Jared Loughner in Tucson, Arizona, Aaron Alexis, at the Navy Yard in Washington, DC, and Army Spc. Ivan Lopez at Fort Hood, Texas – demands additional research, investigation, and understanding as to what went wrong.

The Committee on Energy and Commerce has been leading the way on addressing SMI following the tragedy at Newtown, CT.⁴ As the Committee in the U.S. House of Representatives with jurisdiction over the key federal departments and agencies that play a role in mental health research and care, in January 2013, the Committee announced its intention to examine mental health resources and programs across the federal spectrum.⁵ Since then, the Subcommittee on Oversight and Investigations, under the chairmanship of Rep. Tim Murphy, a practicing psychologist, has held a series of public forums and

¹ Harvey A. Whiteford, *et al.*, "Global Burden of Disease Attributable to Mental and Substance Abuse Disorders: Findings from the Global Burden of Disease Study 2010," *The Lancet.com*, published online August 29, 2013, available at <http://press.thelancet.com/GBDsubstanceandmentaldisorders.pdf>.

² J. W. Swanson, *et al.*, "Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys," *Hospital and Community Psychiatry*, vol. 41, no. 7 (1990), 761 -770.

³ E. Fuller Torrey, "Stigma and Violence: Isn't It Time to Connect the Dots?" *Schizophrenia Bulletin*, vol. 37, no. 5 (2011), 892-896, available at <http://schizophreniabulletin.oxfordjournals.org/content/early/2011/06/04/schbul.sbr057.full.pdf+html>.

⁴ "A Mental-Health Overhaul: A Congressman Produces a Set of Good Ideas for a Difficult Problem," *The Wall Street Journal*, December 25, 2013, available at <http://online.wsj.com/news/articles/SB10001424052702304367204579267030770210744>.

⁵ Available at <http://energycommerce.house.gov/press-release/committee-leaders-announce-plan-review-range-programs-better-understand-what-can-be-done-prevent-tragedies-like-newtown>.

investigative hearings aimed at discerning how federal dollars devoted to research and treatment into mental illness are being prioritized and spent. On December 12, 2013, Rep. Murphy introduced H.R. 3717, the “Helping Families in Mental Health Crisis Act,” addressing many of the concerns raised by the Committee’s investigation.⁶

Results of the Committee’s Investigation

The Committee’s probe has focused on three areas of critical public policy interest: (1) the scope of society’s problem that is untreated SMI, (2) how privacy laws may interfere with patient care and public safety, including in mental health situations, and (3) how federal resources appropriated for research into and treatment of mental illness are being spent.

(1) Untreated Severe Mental Illness

To provide context for the Committee’s investigation of federal priorities in addressing mental illness, the Subcommittee hosted a bipartisan public forum on March 5, 2013, “After Newtown: A National Conversation on Violence and Severe Mental Illness.”⁷ The forum brought together some of the nation’s top mental health experts in the federal government and private practice, leading advocates, and parents to engage in an open dialogue on the state of the mental health system and treatment options for persons with SMI. Among the many issues discussed, the panelists highlighted for the Subcommittee how neither access to health insurance, nor the financial ability to seek help guarantee success in navigating the mental health system.

While recognizing that the vast majority of Americans with a mental illness are nonviolent and themselves are frequently the targets of violence, the Subcommittee heard how effective care continues to elude many of the estimated 11.4 million American adults suffering from SMI, placing their own lives, and sometimes those around them, at risk. For example, the Substance Abuse and Mental Health Services Administration (SAMHSA) estimates that in 2009, 40 percent of adults with SMI reported not receiving any treatment. Complicating matters further, on average, 110 weeks pass between the onset of symptoms and the individual entering into treatment.

As Director of the National Institute for Mental Health (NIMH) at the National Institutes of Health (NIH), Dr. Thomas Insel informed the Subcommittee that treatment can reduce the risk of violent behavior 15-fold in persons with SMI. A study, published in the journal *The Lancet* in May 2014, and examining over 80,000 subjects prescribed antipsychotics and mood stabilizers over three years – of whom a fraction were convicted of a violent crime during the study period – found that “[c]ompared with periods when participants were not on medication, violent crime fell by 45% in patients receiving

⁶ “Murphy Introduces The Helping Families in Mental Health Crisis Act,” Press Release, December 12, 2013, available at <http://murphy.house.gov/HelpingFamiliesInMentalHealthCrisisAct>.

⁷ Available at <http://energycommerce.house.gov/event/after-newtown-national-conversation-violence-and-severe-mental-illness>.

antipsychotics and by 24% in patients prescribed mood stabilizers.”⁸ Yet, even today, as a result of a condition referred to by some as *anosognosia*, half of those individuals with SMI do not even recognize that they have a problem, may resist treatment, and may refuse to take medication that can help them recover.

Also discussed at the March 5, 2013, public forum was the effectiveness of various forms of involuntary commitment – including assisted outpatient treatment (AOT) – in reducing re-hospitalization, victimization, and incarceration in jails and prisons. This is of critical importance as the decrease in the number of public psychiatric beds due to deinstitutionalization has been accompanied by an increase in mentally ill persons who are homeless or confined to jails and prisons. Recent estimates of the number of persons with SMI range from 14.5 to 31 percent of the total prison population.⁹ At some individual correctional institutions, half of all inmates have a mental illness. This trend also has been driven by the fact that many States continue to demand that an individual reach the point of posing an imminent danger, or “danger to self or others” before parents and others can intervene. A less rigid standard, that of “need for treatment,” available in some States, allows for earlier intervention with safeguards built in to protect against abuses.¹⁰

These issues, among other far-reaching implications of the nationwide shortage of inpatient psychiatric beds, were examined in depth at a March 26, 2014 hearing before the Subcommittee, “Where Have All the Patients Gone? Examining the Psychiatric Bed Shortage,” featuring testimony from witnesses in the fields of psychiatry, emergency medicine, law enforcement, the judiciary, the corrections system, and social services for the homeless.¹¹ Witnesses explained that the bed shortage had led to persons with mental illness ending up in prison due to non-treatment of their condition. It also had caused overcrowding in hospital emergency rooms where patients with mental illness are boarded for hours or days awaiting for a bed to open up.

Dr. Jeffrey Geller, a psychiatrist and professor at the University of Massachusetts, testified, in particular, that the bed shortage has been exacerbated by a Medicaid billing policy known as the “Institutions of Mental Disease” (IMD) exclusion, which prohibits federal matching payments for inpatient care of enrollees at psychiatric hospitals with more than 16 beds.¹² States have adjusted their Medicaid programs to maximize reimbursement from the federal government, while closing off access to inpatient treatment for acute psychiatric illnesses.

⁸ Seena Fazel, *et al.*, “Antipsychotics, Mood Stabilisers, and Risk of Violent Crime,” *TheLancet.com*, published online May 8, 2014, available at

<http://download.thelancet.com/pdfs/journals/lancet/PIIS0140673614603792.pdf?id=qaaz76KqVrkpTeOy2e8xu>.

⁹ Henry J. Steadman, *et al.*, “Prevalence of Serious Mental Illness Among Jail Inmates,” *Psychiatric Services*, vol. 60, no. 6 (June 2009), 761-765, available at <http://ps.psychiatryonline.org/data/Journals/PSS/3881/09ps761.pdf>.

¹⁰ Pete Earley, “Deeds Attack Shows That Our System is a Mess,” *USA Today*, November 20, 2013, available at <http://www.usatoday.com/story/opinion/2013/11/20/pete-earley-creigh-deeds-mental-illness/3654793/>.

¹¹ Available at <http://energycommerce.house.gov/hearing/where-have-all-patients-gone-examining-psychiatric-bed-shortage>.

¹² Written testimony of Jeffrey Geller, MD, available at

<http://docs.house.gov/meetings/IF/IF02/20140326/101980/HHRG-113-IF02-Wstate-GellerJ-20140326.pdf>.

(2) Troubles with the Privacy Rule

The inability or unwillingness of some patients to recognize a problem and begin treatment, mental health or otherwise, elevates the importance of an individual's family and friends in any successful effort to obtain care for them.¹³ Parents, sharing powerful stories of their experiences trying to get treatment for their mentally ill children in the current system, expressed concerns at the March 5, 2013 public forum that the Health Information Portability and Accountability Act's (HIPAA) privacy rule may interfere with the timely and continuous flow of health information between health care providers, patients, and families, thereby impeding patient care, and in some cases, public safety.

Generally, HIPAA prohibits covered entities from using or disclosing protected health information, except as expressly permitted or required by the rule. Aside from giving patients the right to examine and obtain a copy of their health records and to request corrections, the privacy rule sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. Studies show that some health care providers apply HIPAA regulations overzealously, leaving family members, caregivers, public health, and law enforcement hindered in their efforts to get information.

On April 26, 2013, the Subcommittee held a hearing entitled "Does HIPAA Help or Hinder Patient Care and Public Safety?" featuring parents, caregivers, trained health care providers, legal experts, and the HHS official charged with enforcing HIPAA.¹⁴ Witness testimony was replete with accounts of thwarted efforts by families and other caregivers to obtain information about a sick family member or even to share pertinent information with the family member's treating physicians. While some experts blamed the language of the law itself for its inconsistent application, noting the broad discretion to disclose information left with the health care provider, others pointed out that many providers may not understand the law, have not trained their staff to apply it reasonably, or are fearful of the threat of fines and jail terms resulting from noncompliance. Such over-caution often results in the failure to disclose protected health information even when disclosure is merited by the circumstances and is nowhere prohibited.

In response to a Question for the Record (QFR) from the Committee, officials of the Office for Civil Rights (OCR), the office delegated the authority of the Secretary of Health and Human Services (HHS) to administer and enforce the privacy rule, affirmed that their focus "is on systemic security problems and longstanding failures of certain entities to fulfill individuals' rights under the Privacy Rule" and not good faith efforts by health care providers to comply with the privacy rule while communicating with patients' family members and friends. In response to another QFR, OCR assured the Committee that "HIPAA in no way prevents health care providers from listening to family members or other caregivers who may have concerns about the health and well-being of the individual, so the health care provider can factor that information into the individual's care."

¹³ Gary Fields, "Families of Violent Patients: 'We're Locked Out' of Care," *The Wall Street Journal*, June 7, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323463704578495154217291958>.

¹⁴ Available at <http://energycommerce.house.gov/hearing/does-hipaa-help-or-hinder-patient-care-and-public-safety>.

While HHS's stated aim of focusing on "systemic" problems is laudable, it is not clear that HHS is doing everything it must to increase public awareness of the privacy rule's purpose, defuse misconceptions surrounding its enforcement, and clarify the importance of action, where common sense and the interest of the patient and the patient's family demand it. On February 20, 2014, possibly in response to concerns raised at the Committee's April 26, 2013 hearing, OCR released revised HIPAA guidance providing clarification, including that health care providers are permitted to inform the family members of a mental health patient "who has capacity and indicates that he or she does not want the disclosure made," if the patient constitutes a "serious and imminent" threat to the health or safety of self or others, and if the family members are in a position to lessen or avert the threat.¹⁵

Unfortunately, as long as misconceptions or ignorance of the rights and responsibilities associated with the privacy rule persist, HIPAA may continue to hinder necessary communication – including in such common, good faith instances – with significant implications for patient care and public safety. Therefore, it may be worthwhile to explore establishing lower barriers for families who, in good faith, seek information about a family member with SMI to protect their health or safety, particularly where that individual is unable to fully understand or lacks judgment to make an informed decision regarding their need for treatment, care, or supervision.

(3) Federal Resources Devoted to Mental Health

To ensure that federal resources are effectively used, it can be helpful to itemize federal spending on mental health programs. As no such compilation of federal programs related to mental health was publicly available at the onset of the Committee's investigation – and to the best knowledge of the Committee had not been undertaken previously for internal government-wide use, planning, or coordination purposes – on April 10, 2013, the Committee requested that the Office of Management and Budget (OMB) produce a comprehensive inventory of federal programs supporting mental health research, prevention, and treatment.¹⁶ The Committee received OMB's response in a letter dated November 7, 2013 (see Attachment), disclosing federal government-wide outlays on mental health for the first time.

In brief, OMB reported that in fiscal year (FY) 2012, \$130 billion in federal funds – of which, \$13 billion were discretionary and \$117 billion were mandatory – were directed to mental health surveillance, research, prevention, and treatment activities, as well as income support and other social services for individuals with mental illness. Of this total, in FY 2012, just over \$40 billion was paid out under Medicare and Medicaid programs, approximately \$2 billion at NIH, and over \$1 billion at SAMHSA. In addition to HHS agencies, in FY 2012, mental health research, prevention, and treatment activities across

¹⁵ Available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/mhguidancepdf.pdf>.

¹⁶ Available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20130410OMB.pdf>.

the Department of Defense amounted to \$2.9 billion, and nearly \$6.5 billion at the Department of Veterans Affairs. On top of that, in that same year, income support and other social services for individuals with mental illness were funded at \$1 billion by the Department of Education and nearly \$76 billion by the Social Security Administration.

Noting limitations on any attempt to estimate all federal mental health spending in any given year, OMB explains that there are a number of other federal programs that address mental health as part of broader activities, but do not track funds directed to the mental health component. This would include, for example, federally funded activities targeted to address substance abuse, but that benefit individuals with co-occurring substance abuse and mental illness. There are also federal services or benefits provided to individuals with mental illness that are not furnished exclusively on the basis of the individual's mental illness – for example, in FY 2012, an additional \$125 billion in federal funds supported broader activities that include a mental health component and services that support a population that includes individuals with mental illness who are not separately identifiable.

Focusing in on HHS Spending, and SAMHSA in particular

The Committee's investigation of mental health spending concentrated on programs administered by HHS, host to both NIH, the lead federal agency for supporting biomedical and behavioral research, and SAMHSA, the lead federal agency for increasing access to mental health and substance abuse treatment and prevention services.

The majority of NIH's spending for mental health research is administered by NIMH. The National Institute on Drug Abuse, the Eunice Kennedy Shriver National Institute of Child Health and Human Development, the National Institute of Neurological Disorders and Stroke, and the National Institute on Alcohol Abuse and Alcoholism also support some research in mental health. In FY 2011, NIMH's total program-level funding (including extramural research, intramural research, and research management and support) was \$1.475 billion. In FY 2012, this figure rose slightly to \$1.479 billion.

SAMHSA, whose mission is split between mental health and substance abuse treatment and prevention services, enjoyed program-level funding of \$3.599 billion in FY 2011 and \$3.565 billion in FY 2012. Of that total, SAMHSA's Center for Mental Health Services (CMHS) received \$1.022 billion in program-level funding in FY 2011 and \$0.999 billion in FY 2012, supporting access to mental health services through various grant programs. Competitive grants for mental health, substance abuse treatment, and substance abuse prevention account for about one-third of SAMHSA's budget. Formula grant programs for mental health, substance abuse treatment, and substance abuse prevention account for the other two-thirds of the agency's budget.

With the aim of taking a closer look at how SAMHSA puts federal dollars to use, on May 22, 2013, the Subcommittee held a hearing, "Examining SAMHSA's Role in Delivering Services to the Severely Mentally Ill," featuring SAMHSA Administrator Pamela Hyde, a panel of outside experts, and an individual whose family had been seriously impacted by

SAMHSA's programs.¹⁷ Ms. Hyde was confronted over Member and witness concerns that SAMHSA – being preoccupied with more moderate forms of mental illness, broadly defined behavioral health concerns, or emotional disturbance – was insufficiently focused on addressing those hardest-to-treat cases of SMI, for which inaction carries the greatest risks to the patient and surrounding communities, as illustrated in the recent cases of Adam Lanza and Aaron Alexis. Furthermore, individuals with SMI consume a greater proportion of public resources – healthcare, social services, and criminal justice – relative to their overall population. The city of San Francisco identified the 477 largest consumers of emergency health services; more than a quarter of the individuals had schizophrenia.¹⁸ Miami-Dade County identified 97 individuals, mostly men with untreated schizophrenia, who were arrested 2,200 times and spent 27,000 days in jail over a five-year period at a cost of \$13 million.¹⁹ In the State of Maryland, just 500 patients cost the State's Medicaid program \$36.9 million largely due to repeat hospitalizations.²⁰

In response to a QFR probing SAMHSA's funding priorities, Ms. Hyde wrote that "SAMHSA's role is not limited to certain mental illnesses or a small number of mental health conditions. . . SAMHSA is concerned about all Americans, whether they are in need of prevention or whether they are facing mild, moderate, or serious and persistent mental health issues." Nonetheless, SAMHSA claimed to have allocated approximately 81 percent of the FY 2013 CMHS budget to support "adults with and at risk for serious mental illness and/or children with serious emotional disturbance [SED]."

While several of SAMHSA's programs, such as the Community Mental Health Services Block Grants, are required statutorily to support services treating adults with SMI and children with SED, among others, SAMHSA did not provide the Committee with further evidence that these dollars are reaching the most at-risk individuals. Interestingly, OMB, in its November 7, 2013 response to the Committee's bipartisan request of April 10, 2013, neglects to address, at all, the subpart of the Committee's inquiry demanding information on "the amount of such funds that are used to support efforts to address serious mental illness."

Witnesses also spoke of troubling gaps in the integrity of the agency's grant screening process, inadequate responses to potential violations of federal lobbying prohibitions by certain grantees, as well as instances of grantee activism seemingly at odds with the science of psychiatry and SAMHSA's founding mission. In testimony delivered at the May 22, 2013 hearing, Dr. E. Fuller Torrey, founder of the Treatment Advocacy Center,

¹⁷ Available at <http://energycommerce.house.gov/hearing/examining-samhsas-role-delivering-services-severely-mentally-ill>.

¹⁸ R. Jan Gurley, "Meet San Francisco's 477 Most Expensive High Utilizers of Medical Services," *Reporting on Health*, May 3, 2011, available at <http://www.reportingonhealth.org/blogs/meet-san-franciscos-477-most-expensive-hums-high-utilizers-medical-services>.

¹⁹ Jan Pudlow, "Stop Treating Mental Illness as a Crime," *Florida Bar News*, December 1, 2013, available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/C2729BF949577C1B85257C2E0048EA93>.

²⁰ John J. Boronow and Stephen S. Sharfstein, "Close the Mental Health Revolving Door," *Baltimore Sun*, December 29, 2013, available at http://articles.baltimoresun.com/2013-12-29/news/bs-ed-commitment-20131228_1_poor-patients-illness-treatment.

noted that “SAMHSA has funded similar organizations under its consumer grant program and its Protection and Advocacy grant program that have *actively impeded the implementation of improved treatment laws* [like AOT] in many other states,” (emphasis added) including Maine and Pennsylvania. These concerns were most dramatically illustrated in testimony delivered by Joe Bruce, a Maine resident whose story was featured in a 2008 article in *The Wall Street Journal*.²¹

In 2006, Joe’s wife, Amy, was murdered by their son, Will, only months after being released from a psychiatric center where he had been treated for schizophrenia. Joe believed that the efforts of the SAMHSA-funded Disability Rights Center, based in his home State of Maine, obtained his son’s premature release from the hospital without putting in place a mechanism for ensuring that Will would remain on his medications. Ultimately, it took the death of Joe’s wife at Will’s hands to get Will on a consistent medication regime to treat the symptoms of his schizophrenia.

In 2009, Will wrote to members of the Maine State Legislature’s Health and Human Services Committee in support of LD 1360, a bill adopting AOT, thereby improving Maine’s ability to provide treatment to people with severe mental illnesses by allowing for outpatient commitment as an alternative to inpatient hospitalization. LD 1360 was signed into law by Maine Governor John Baldacci, on April 14, 2010, despite efforts by the Disability Rights Center, and several other organizations, to defeat it.²²

While noting SAMHSA’s status as a component of the U.S. Public Health Service and the Federal government’s lead agency for reducing the impact of mental illness on America’s communities, the hearing raised concerns about SAMHSA’s commitment to recruiting individuals with genuine scientific expertise. For unknown reasons, SAMHSA was not forthcoming in sharing with the Committee the fact that, as of August 2013, the agency of 534 employees employed no more than 4 M.D. psychiatrists – a surprisingly low figure given SAMHSA’s designation as the lead federal agency for increasing access to mental health, handling a mental health-related budget of over \$1 billion. Although this information – as well as general figures regarding the educational backgrounds of SAMHSA’s staff – initially was requested by the Committee in a May 8, 2013 letter to SAMHSA²³ and Ms. Hyde was unable to provide a response at the May 22, 2013 hearing, it finally was answered in an email to Committee staff dated August 19, 2013.

In response to a QFR requesting whether the agency requires those that evaluate grant applications for science quality and integrity hold advanced degrees in social work, psychology, and psychiatry, Ms. Hyde responded that “[r]eviewers often have advanced degrees related to the mental health/prevention/treatment field and decades of experience.” Throughout discussions with Committee staff, SAMHSA officials have noted

²¹ Elizabeth Bernstein and Nathan Koppel, “A Death in the Family,” *The Wall Street Journal*, August 16, 2008, available at <http://online.wsj.com/news/articles/SB121883750650245525>.

²² Disability Rights Center News, Summer 2009, available at http://www.drcme.org/uploads/Newsletter_2009.pdf

²³ Available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20130508SAMHSA.pdf>

the valued role played by individuals with mental illness, or “consumers,” in the grant screening process. Such individuals may have no specialized training as mental health professionals, their qualification to serve as grant reviewers resting simply on a medical diagnosis and resulting “lived experience.” While affirming that grant reviewers are required to sign a form attesting that they do not have a conflict of interest with any of the applications under review, SAMHSA provided no evidence of efforts preemptively to identify or root out instances of fraud or abuse that may arise in this manner.

Members also raised concerns about SAMHSA’s commitment to ensuring post-award grantee compliance with the terms of their grants, including federal law. For example, witnesses described recipients of certain formula grants engaging in what appeared to be prohibited lobbying activities at the State level – one, specifically, opposing a proposed tightening of civil commitment laws. In response, SAMHSA indicated that all applicants are made aware of the prohibition on using federal funds for lobbying and, if applicable, must complete a Disclosure of Lobbying Activities. SAMHSA acknowledges that “[e]ntities designated to receive these Federal funds may have other sources of funding” that could be used for lobbying. However, with between 95 to 98 percent of total operating revenue for many PAIMI grantees coming from federal sources, it defies credulity that extensive lobbying activities are paid for solely with private donations or State or local funding. Short of affirmatively requiring a segregation of and detailed accounting for the use of federal versus non-federal funds, it will be difficult – if not impossible – to deter or prevent these kinds of abuses.

The hearing drew attention to troubling activities undertaken by SAMHSA grantees and the agency’s limited ability and/or willingness to rein them in. For example, Chairman Murphy referenced anti-psychiatry views expressed by participants at numerous SAMHSA-funded conferences – including an instance in which individuals with mental illness were encouraged to go off their physician-prescribed medicine. In response, Ms. Hyde confirmed that SAMHSA “fund[s] a number of conference efforts and others” but “[w]e do not go inside each individual presentation to identify whether or not we agree with each individual presenter.” Responding to a question from Ranking Member Diana DeGette as to whether some SAMHSA-funded patient advocacy groups may in fact advise individuals not to take their psychotropic drugs, Ms. Hyde responded “[t]hey very well may. . . . Those groups may have that policy,” all while SAMHSA continues to fund such organizations and conferences to the tune of millions of dollars per year.

Conclusion

Perpetrators of recent mass killings linked to untreated SMI, whether Seung-Hui Cho or James Holmes, Jared Loughner or Adam Lanza, all exhibited a record of major psychiatric problems prior to their crimes. More recently, in November 2013, even an emergency custody order following a psychiatric examination was not enough to prevent Austin Deeds from being released from a treatment center citing lack of beds; upon release, he proceeded to stab his father, Virginia State Senator Creigh Deeds, before killing himself.

None of these cases are attributed to the failure or inability of mental health professionals to make an early identification of the perpetrator's mental illness. Rather, the critical factor missing in these cases was any assurance that such individuals would obtain, and remain under, effective psychiatric treatment. In the Deeds case, the dire implications of the nationwide shortage in quality outpatient, community treatment programs and inpatient psychiatric beds – the latter being a function of the sharp decline in the capacity of State psychiatric hospitals over the past several decades resulting from deinstitutionalization and the IMD exclusion – were prominently featured.

The Committee's inquiry has drawn attention to the importance of targeting funds for mental health to areas with the greatest impacts on public health and safety. This may require, in certain instances, reprogramming the federal government's support for programs to those shown to deliver the most positive health-related outcomes for individuals with SMI, improving the prospects for recovery of those currently not receiving proper treatment. The revelation that federal spending on mental health exceeded \$130 billion in FY 2012, including \$54 billion for surveillance, research, prevention, and treatment activities alone illustrates the importance of improving coordination across agencies to combat waste and duplication.

The findings of the Committee's investigation underscore the need to improve training for law enforcement and emergency medical services personnel on mental health issues. They also demonstrate the importance of training primary care physicians in mental healthcare, noting the interconnectedness between medical and mental health problems, while working toward a better integration of psychiatric and primary care, particularly as psychiatrists remain in short supply.

Due to the effects of *anosognosia*, many individuals with SMI have difficulty acknowledging that they have a legitimate psychiatric diagnosis, let alone following through on a physician-approved treatment regimen. For this population, re-hospitalizations and re-incarcerations can be quite common. Where they have been implemented, alternatives to long-term inpatient care, such as AOT, have been proven to save money for State and local governments by reducing the rates of imprisonment, homelessness, substance abuse, and costly emergency room visits by the chronically mentally ill. Where possible, expansion of federal incentives for States and localities to experiment with AOT may encourage a more humane, supervised, and results-oriented reintegration of individuals with SMI into their communities.

Good Process Makes Good Policy: Reforming the FCC

First Released As Part of This Compilation

Introduction

The communications and technology sector is among the most competitive and innovative of our economy. From fiber optics to 4G wireless service, the smartphone to the tablet and the connected TV, this sector has been creating new services, new devices, and, most importantly, high-quality jobs. In 2010, the industry invested \$66 billion to deploy broadband infrastructure, \$3 billion more than in 2009, totaling more than half a trillion dollars invested to upgrade their networks over the past 8 years.¹ America is the world leader in wireless LTE network deployment.

The Federal Communications Commission, charged with regulating this vibrant sector of the economy, should engage in judicious policymaking – fair, transparent process coupled with rigorous analysis demonstrating the need for regulation before intervening in the marketplace. It does not always do so, and the Committee on Energy and Commerce has long made it a priority to give the agency the tools to improve the processes and procedures under both Republican and Democrat-led commissions.

Need for Reform

In the 110th Congress, the committee and its Subcommittee on Oversight and Investigations investigated the FCC's procedures, ultimately leading to a report documenting abuses at the agency.² In 2008, the National Association of Regulatory Utility Commissioners wrote an open letter to President Obama's transition team, highlighting the need for structural and procedural reforms at the FCC and suggesting 13 separate reforms to consider.³ In 2009, then-Professor Philip Weiser wrote that "the great weight of opinion is that the FCC has always operated in a suboptimal fashion and is in dire need of institutional reform."⁴ And in 2010, Public Knowledge called for a "shock to the system" and "a surrender of discretion by FCC leadership and a move away from unpredictable and ad hoc decision making."⁵ Industry and consumers alike have recognized the need for change within the agency.

¹ See US Telecom, Broadband Industry Stats, Broadband Investment, <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>.

² See House Committee on Energy and Commerce, Deception and Distrust: The Federal Communications Commission under Chairman Kevin J. Martin, 110th Cong. (2008).

³ See Letter from Frederick Butler, President, NARUC, to Susan Crawford, Visiting Professor, Yale Law School, Obama-Biden Transition Team on the FCC (Dec. 12, 2008), available at <http://www.naruc.org/Testimony/08%201212%20RV%20FCC%20Transition%20letter.pdf>.

⁴ Philip J. Weiser, FCC Reform and the Future of Telecommunications Policy at 2 (Jan. 5, 2009), available at <http://fcc-reform.org/paper/fcc-reform-and-future-telecommunications-policy>.

⁵ Michael Weinberg and Gigi B. Sohn, An FCC for the Internet Age: Recommendations for Reforming the Federal Communications Commission (Mar. 5, 2010), available at <http://go.usa.gov/PyH>.

The FCC has aspired to improve its own processes. In 2009, Commissioner Robert McDowell and Acting Chairman Michael Copps exchanged letters on a number of reforms to FCC process that both officers agreed were sorely needed.⁶ Past Chairman Julius Genachowski testified twice before this committee on his efforts to improve FCC processes and appointed a “Special Counsel for Innovation in Government.”⁷ Current Chairman Tom Wheeler also appointed a special counsel for FCC process and has pledged to see through reforms recommended by the counsel’s report, which was submitted on January 30, 2014.⁸

However, genuine, long-term reform can only come through legislation. Good intentions may only last through one administration, but legislation will ensure that reforms continue through leadership changes. Only legislation will allow the commissioners to engage in non-public, collaborative discussions that are currently prohibited by the Government in the Sunshine Act. And legislation is the only vehicle to ensure the formation of procedural boundaries that prevent executive discretion from edging out fundamental due process.

That’s why the committee drafted H.R. 3675, the FCC Process Reform Act. The bill, which unanimously passed the full House in March 2014, is the product of bipartisan subcommittee negotiations and provides a significant step towards a better-functioning agency.

Clearer Process

The FCC Process Reform Act sets goals for improving the agency’s notice and comment procedures. The commission must establish and publicize clear deadlines and minimum comment periods for rules and publication of FCC documents. The commission also must allow time for public comment by eliminating the practice of placing large amounts of data into the record on the last day of the public comment period. Of particular note, the FCC would be required to publish the text of proposed rules in a rulemaking, which will allow commenters to understand the impact of the proposed regulations much more clearly.

The legislation also requires the FCC to set timelines for finishing certain types of proceedings, reducing the wait time for companies seeking approval from the agency to proceed with business. Congress established these requirements but permitted the FCC to engage in a rulemaking in order to determine the appropriate deadlines, timelines, and

⁶ See Letter from Robert M. McDowell, Commissioner, FCC, to Michael J. Copps, Acting Chairman, FCC (Jan. 27, 2009), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-288104A1.pdf; Letter from Michael J. Copps, Acting Chairman, FCC to Robert M. McDowell, Commissioner, FCC (Jan. 28, 2009), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-288135A1.pdf.

⁷ See Press Release, “Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies” (July 11, 2011) available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-308340A1.pdf.

⁸ See Blog Post, “Opening Day at the FCC: Perspectives, Challenges, and Opportunities” (November 5, 2013) available at <http://www.fcc.gov/blog/opening-day-fcc-perspectives-challenges-and-opportunities>; Chairman’s Statement on Process Reform Presentation (rel. January 30, 2014) available at <http://www.fcc.gov/document/chairmans-statement-process-reform-presentation>.

procedures for implementing these requirements. In addition, the required notice of inquiry asks the FCC to seek public comment on particularly complex issues that warrant further examination and improvement. The end result is a collaborative process, with Congress establishing the parameters for good process and the agency determining the best path to meet those standards.

Performance Metrics

While the legislation allows the commission to set many of its own procedures and rules, the legislation also includes backstops that ensure accountability. The annual scorecard required by the legislation mandates yearly reports by the FCC regarding its performance in meeting the deadlines and guidelines established in the rulemaking. Taking inventory of whether the commission is meeting its deadlines will allow the FCC to improve where needed and will give the regulated parties, the commission itself, Congress, and the public insight into the agency's activity.

Increased Ability to Collaborate

Provided the commission completes the required rulemaking and inquiry process, the legislation also includes provisions allowing commissioners to engage in non-public, collaborative discussions that are currently prohibited by the Government in the Sunshine Act. The new provisions remedy real procedural problems for the commission and contain significant safeguards to preserve the increased transparency that is the goal of the Government in the Sunshine Act. Non-public collaborative meetings would be monitored by attorneys from the Commission's Office of General Counsel, and each meeting would require public disclosure of the content of the meeting. The delayed implementation will ensure that both the statutory and regulatory changes to the commission's process take effect contemporaneously.

A Firmer Path to Prosperity

The communications industry is one of the few sectors still firing on all cylinders in this economy; the market is more competitive than it has ever been before, and the underlying technologies and business models are evolving at a rapid and accelerating pace. The FCC Process Reform Act will create a stronger, better regulatory agency for one of the economy's most vibrant sectors. Job creators deserve an efficient and effective expert regulator, and the public deserves a transparent and accountable federal government.

Making the Most of America's Airwaves: Government Spectrum Policy

First Released As Part of This Compilation

Introduction

Spectrum is one of the most in-demand resources in our technology-centric economy as Americans increasingly expect the ability to access information, enjoy content, and conduct commerce from a mobile device anywhere in the country. While demand grows, the amount of spectrum is finite, and there is very little that has not already been allocated for use. Creative solutions are needed to ensure that there will continue to be spectrum for innovative use. The committee has been working to best determine methods to repurpose spectrum to increase the amount available to commercial users. For example, the committee and the full House passed legislation to make broadcast spectrum available through a first-of-its-kind incentive auction, allowing broadcasters to relinquish spectrum voluntarily to the highest bidder. However, the committee continues to look for other ways to extract additional spectrum from less efficient uses for more innovative and productive purposes.

Making Federal Spectrum Available for Private Sector Use

The federal government is the biggest single user of spectrum, with licenses issued and administered by the National Telecommunications and Information Administration. Federal spectrum can be maximized to provide additional spectrum for commercial use, but only if the government is willing to examine how agencies use their allocated spectrum and offers incentives for more efficient use. The two primary approaches for making federal agency spectrum available to the private sector are reallocation – clearing current users off of the spectrum band and allotting it to new users, and sharing – allowing commercial and government the same band of spectrum while minimizing the potential for interference.

Reallocation

Of the two approaches, Congress has expressed its preference for reallocation as the resulting spectrum is better suited for commercial use and generally contributes higher auction proceeds for the Treasury. In the past, federal users have relinquished spectrum or relocated to other bands to make more spectrum available for auction to the private sector. To facilitate such clearing, the 2004 Commercial Spectrum Enhancement Act (CSEA) authorizes the FCC to hold contingent auctions of spectrum used by federal agencies. If the proceeds of the auction cover the cost of relocating the federal agencies by 110 percent, the winning bidders receive licenses for the spectrum and the federal agencies receive funding to relocate.

One particularly successful example of this approach was the 2006 auction of the AWS-1 band (1710-1755 MHz and 2110-2155 MHz). The auction raised more than \$13 billion dollars for the treasury and made 90 MHz of spectrum available for commercial deployment – spectrum that now powers many of the 4G networks across the country.

Following the success of the AWS-1 auction, and pursuant to the provisions of the Middle Class Tax Relief Act of 2012, the FCC began the process of clearing and reallocating the spectrum used by federal agencies in 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz. As part of the oversight of the auction, the committee held a hearing in June 2013 to examine the spectrum needs and use of federal agencies, and how to improve federal spectral efficiency. As a result of that hearing, there was a bipartisan effort to urge the consolidation and clearing of the bands. Coordination among the Pentagon, FCC, and NTIA, facilitated by the committee, freed up 65 MHz of spectrum. The AWS-3 auction of this spectrum began in late 2014 and generated more than \$44 billion in its opening weeks, far exceeding the reserve price and most predictions for the auction. These successful auctions are evidence that reallocation of government spectrum can benefit both the government and the commercial sectors if reallocation can be accomplished effectively.

The lessons learned in the AWS-1 auction were incorporated into the through amendments in the Middle Class Tax Relief and Job Creation Act of 2012. The experience gained from the auction was leveraged to smooth the process of clearing, provide funding for advance planning, and facilitate system upgrades. In addition to improving the CSEA through the incentive auction legislation, subcommittee Chairman Walden and Ranking Member Eshoo established the Federal Spectrum Working Group within the Subcommittee on Communications and Technology in 2012 to continue to examine how the federal government can use the nation's spectrum resources more efficiently. The bipartisan working group, led by Representatives Brett Guthrie (R-KY) and Doris Matsui (D-CA) held numerous meetings with government agencies to discuss creative ways to achieve this goal. H.R. 3674, the Federal Spectrum Incentive Act of 2013 (FSIA), is the product of the working group and those discussions.

The FSIA would amend the CSEA to provide federal users an additional option for relinquishing spectrum for commercial auction. In December 2013, the committee approved H.R. 3674. The legislation would allow federal users to either relocate or terminate their operations and auction the relinquished spectrum, and in exchange, receive a percentage of the net auction proceeds. Funds from the proceeds would have been placed into a fund at the Office of Management and Budget to be used for relocation costs or to offset budget sequestration. H.R. 3674 builds upon previous legislation by providing federal agencies an incentive to make their use of spectrum more efficient. This legislation provides a path for federal users that elect to discontinue radio operations without relocating to other frequencies or that relocate operations to share with another federal user, to receive a percentage of the auction proceeds the spectrum generates.

Sharing

An alternative to clearing federal users is to allow commercial interests to share the spectrum so long as they can do so in a way that does not interfere with the federal use. There are many types of sharing, which employ various technologies and methods of coordination to minimize interference.

There have been efforts to determine the best methods for sharing, in order to protect the government users while still allowing for commercially viable uses. In 2012, the President's Council of Advisors on Science and Technology released a report on freeing up spectrum for broadband use, focusing primarily on approaches to spectrum sharing.

In June 2013, the Obama administration issued a Presidential Memorandum directing federal agencies to assess their current and prospective spectrum use, to consider ways of improving efficiency, to examine the possibility of relying on commercial services rather than dedicated spectrum, to evaluate opportunities for relinquishing or sharing spectrum for commercial use without jeopardizing the agencies' missions, and to share data with the private sector. The memorandum also created a Spectrum Policy Team to recommend ways of incentivizing agencies to share or relinquish spectrum and encouraged the FCC to expedite the repurposing of spectrum and to promote receiver performance as a way of improving spectrum efficiency.

The committee has taken steps to encourage responsible unlicensed use of spectrum in shared bands, including specific provisions of the Middle Class Tax Relief Act targeted at creating greater opportunities for unlicensed use. The Act directed the FCC to examine the feasibility of allowing unlicensed devices to operate in the 5 GHz band, populated by incumbent licensed federal and non-federal users. Pursuant to the law, the FCC completed a proceeding that ultimately resulted in 100 MHz of spectrum being made available for unlicensed use, predominantly for Wi-Fi and other high-speed wireless connections. The commission modified technical rules that protect incumbent users, as well as rules that restricted some operations of unlicensed users.

While sharing is an option for making more spectrum available, it presents many challenges that would require substantial technical coordination and potentially legislative action.

Increasing Efficient Use of Spectrum

One approach to increasing the amount of usable spectrum is improving the technology that allows spectrum users to co-exist peacefully, without interfering with each other's operations. Receiver filters are the tools for devices to listen for only their own signals, so as to not interfere with the signals directed toward other devices. Improving the performance of these receivers minimizes the likelihood of interference, and subsequently minimizes the distance the must exist between signals and services. As part of the Middle Class Tax Relief Act, the committee mandated a study on receiver performance and efforts to ensure that systems are designed and operated so that spectrum use doesn't harm

systems and users nearby. Pursuant to the Act, the Government Accountability Office released a report on options and challenges to improving receiver performance. Receiver performance has also been the subject of a report by the FCC's Technical Advisory Committee, and was addressed in the PCAST report on spectrum use. While improved receiver performance results in more efficient spectrum use, imposing government standards for performance can have the unintended consequence of forcing manufacturers to design device filters for the worst-case scenario, resulting in expensive and often unnecessary device elements.

Conclusion

Spectrum is a finite resource that is in ever-increasing demand. To adequately respond to this demand, creative solutions are necessary for clearing, consolidating, and sharing spectrum. There must also be discussion of the appropriate management of spectrum, both federal and commercial, through licensing and authorizing. While there have been significant improvements in spectrum utilization, there still remains a great deal to be done in order to ensure all users are effectively and efficiently using the airwaves they've been assigned.